TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 271

TURNER, DENNIS & LOWRY LUMBER COMPANY,
PLAINTIFF IN ERROR,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FILED FEBRUARY 10, 1925

(30,861)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 9, 1925

[fol. a] CITATION—In usual form, showing service on J. N. Davis & Fred S. Hudson; filed Jan. 14, 1925; omitted in printing

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[fol. b] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR—Filed Jan. 14, 1925

UNITED STATES OF AMERICA, set:

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western Division of the Western District of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, at the November Term, 1924, thereof, between Turner, Dennis & Lowry Lumber Company and Chicago, Milwaukee & St. Paul Railway Company a manifest error hath happened, to the great damage of the said Turner, Dennis & Lowry Lumber Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 13th day of February, 1925, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, and the seal of said District Court.

Issued at office in Kansas City, this 14th day of January, in the year of our Lord one thousand nine hundred twenty-five.

Edwin R. Durham, Clerk, by A. Vinick, Deputy Clerk. (Seal of the United States District Court of Missouri, Western Division, Western District.)

Allowed by Alba S. Van Valkenburgh, District Judge.

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, set:

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals a duly certified

transcript of the record and proceedings in the within entitled case, and with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said District Court of the United States for the Western Division of the Western District of Missouri.

Issued at office in Kansas City, this 30th day of January, A. D. 1925.

Edwin R. Durham, Clerk, by H. C. Spaulding, Deputy Clerk.
(Seal of the United States District Court of Missouri, Western Division, Western District.)

[File endorsement omitted.]

[fol. 1] [Caption omitted]

[fol. 2] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

No. 5703

TURNER, DENNIS & LOWRY LUMBER COMPANY, Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant

PETITION—Filed Sept. 13, 1923

Plaintiff, for its cause of action alleges:

1. That it is a corporation organized under the laws of Missouri, having its chief office at Kansas City, in said state, and is a citizen of Missouri and of said Western District thereof.

2. That defendant is now and was at all times hereinafter mentioned, a corporation doing business as a common carrier of passengers and freight for hire, wholly by railroad between points in the state of Missouri and points in Washington, Montana, Idaho, South Dakota, Minnesota and other states, and as such common carrier was and is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto.

3. That plaintiff was at the times herein mentioned engaged in buying and selling lumber at wholesale and in the conduct of such business bought certain lumber in the state of Idaho from St. Maries Lumber Company and on or about November 16, 1921, said St. Maries Lumber Company caused to be delivered to defendant carrier and defendant accepted and received for transportation and shipment from St. Maries, Idaho, to plaintiff at Aberdeen, South Dakota,

[fol. 3] certain lumber which was shipped in I. C. car number 174767; that by the provisions of the existing and published tariffs, it was plaintiff's right and privilege, upon payment of a "reconsignment charge" of $7.00 per car, to reconsign said shipment from the original destination, to-wit, Aberdeen, South Dakota, to certain other points designated in the tariff, including Minnesota Transfer, Minnesota, at the regular through tariff rate from the original point of origin to such final destination; that said car containing said shipment arrived at Aberdeen, South Dakota, on November 27, 1921, notice of arrival was given plaintiff on November 28, 1921, and on December 5, 1921, plaintiff directed said carrier to reconsign said car to Central Warehouse Lumber Company at Minnesota Transfer, Minnesota, on defendant's line of railroad; that under and by the provisions of the published tariffs it was provided that when cars are held for reconsignment, diversion or reshipment, a demurrage charge of $2.00 for each of the first four days and $5.00 for each succeeding day shall be paid for each day such cars are held beyond twenty-four hours after the day on which notice of arrival of the car at the billed destination is sent or given to the consignee; that as compensation for the transportation of said shipment defendant exacted and collected freight at the existing and published tariff rate governing and applying upon said shipment, to-wit, 62½ cents per one hundred pounds, aggregating the sum of $315.69, and demurrage in the sum of $13.00; that defendant's published tariffs also provided that

"To prevent undue detention of equipment under present emergency, the following additional penalties for detention of equipment will apply:

"1. On cars loaded with Lumber held for reconsignment a storage charge of $10.00 per car will be assessed for each day or fraction of a day that a car is held after 48 hours after the hour at which free time begins to run under the demurrage rules;"

that defendant, under purported authority of said tariff, and in addition to the freight and demurrage charges above referred to, and concurrently with the time for which demurrage was collected, un-[fol. 4] lawfully and illegally exacted and collected as a penalty and punishment for the detention of said car a charge of $10.00 per day, aggregating $40.00, which plaintiff was required to pay and has paid.

4. That defendant assessed and collected said penalty charge by the pretended authority of tariff schedules filed with the Interstate Commerce Commission, but that defendant was without authority to exact and collect said charges for the following reasons:

(a) Said penalty of $10.00 a day was inflicted in addition to all compensatory charges, as a punishment only, and in no degree as compensation, and its imposition was unlawful and illegal because the prescription of a penalty is a legislative function which could not be delegated to either a carrier or the Interstate Commerce Com-

mission, and the prescription and infliction thereof by defendant was a usurpation of a legislative function;

(b) Plaintiff was deprived of its property without due process of law by the infliction of a punishment without notice and without opportunity for a hearing of any kind, in violation of the Fifth Amendment to the Constitution of the United States;

(c) By the infliction and collection of said penalty plaintiff was denied the equal protection of the laws and was deprived of its property without due process of law, all in violation of the Fifth Amendment to the Constitution of the United States in this: said penalty was imposed and inflicted as a punishment for the detention of cars and was inflicted on shipments of lumber detained for the purpose of reconsignment and was not inflicted on shipments of other commodities detained for the purpose of reconsignment, although the detention of shipments of other commodities for reconsignment deprived other shippers and the carriers of the use of the same kind of cars and of the same cars in the same manner as did the detention of lumber for reconsignment ,and by the terms of said tariff and by [fol. 5] the application of it shippers of lumber who detained cars for the purpose of reconsignment were governed by one rule and shippers of other commodities, who detained the same kind of cars and the same cars for the purpose of reconsignment, were governed by another rule;

(d) By the terms of said pretended tariff said penalty was inflicted as a punishment for the detention of cars and applied only to cars loaded with lumber, and only to cars loaded with lumber which were being held for reconsignment, and did not apply to cars loaded with lumber and held for purposes other than reconsignment, or to cars loaded with other commodities and held for reconsignment, although lumber is not, and was not, shipped in any special or particular kind of car but is and was shipped in cars at the time most available and in any and all varieties of freight cars except hopper cars; that said penalty was exacted without regard to the character of car used or detained, and many other commodities were reconsigned in transit in the same kind of cars and in the same cars as were used for the shipment of lumber, and the detention of such shipments deprived other shippers and the carriers of the use of such cars to the same extent as did the detention of cars loaded with lumber and held for reconsignment; and that by the infliction of said penalty plaintiff was interfered with in conducting its wholesale lumber business, was denied the equal protection of the laws and was deprived of its property without due process of law, all in violation of the Fifth Amendment to the Constitution of the United States, and defendant has subjected plaintiff, and plaintiff's particular description of traffic, to an undue or unreasonable prejudice or disadvantage in violation of the act to regulate commerce, approved February 4, 1887, and acts amendatory and supplementary thereto.

5. That by the assessment, collection and exaction of said penalty by defendant, plaintiff has been damaged in the sum of $40.00.

[fols. 6 & 7] 6. That plaintiff has heretofore demanded of defendant repayment of said sum unlawfully exacted but defendant has refused and refuses to make such repayment.

Wherefore, plaintiff prays judgment against defendant in the sum of Forty Dollars $40.00 together with interest thereon from December 20, 1921, and its costs herein incurred.

Rees Turpin, Edward A. Haid, Attorneys for Plaintiff.

[fols. 8 & 9] In United States District Court

[Title omitted]

Answer—Filed Nov. 5, 1923

Comes now the defendant in the above entitled cause and for answer to plaintiff's petition states as follows:

First. Defendant admits the allegations set forth in Paragraph 1 of plaintiff's petition.

Second. Defendant admits the allegations set forth in Paragraph 2 of plaintiff's petition.

Further answering paragraphs 3, 4 and 5 of plaintiff's petition, defendant states that the pretesded cause of action set up in said counts is one dealing with the question of rates, and is not a question of undercharge or overcharge for services rendered by the said defendant, and that therefore this court is without jurisdiction in this case ,the said court not being possessed of the power to establish rates, but that the power to establish rates and charges is particularly within the province and jurisdiction of the Interstate Commerce Commission and not within the jurisdiction of this court.

And further answering plaintiff's petition, defendant denies each and every allegation therein contained except such as are herein specifically admitted and set out.

Wherefore defendant having fully answered asks to be discharged with its costs.

Fred S. Hudson, Attorney for Defendant.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION TO WAIVE A JURY—Filed Dec. 19, 1923

It is hereby stipulated between the parties to this action that a jury shall be waived and that the cause shall be tried by the court without a jury.

Rees Turpin, E. A. Haid, Attorneys for Plaintiff. Fred S. Hudson, Attorney for Defendant.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY—Sept. 17, 1924

This day there is filed herein agreed statement of facts, and this cause coming on for hearing, a jury having heretofore been waived, the same is submitted to the court, and by the court taken under advisement.

Said Agreed Statement of Facts appears in the Bill of Exceptions filed herein and in accordance with stipulation of the parties is not here set forth. It being agreed that same shall be printed as appearing in the Bill of Exceptions.

[fols. 12 & 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Nov. 8, 1924

Now at this day, to wit the 17th day of September, 1924, this cause coming on to be heard, and defendant appearing by attorneys, and plaintiff appearing by attorneys, by agreement of parties plaintiff and defendant, as per written stipulation on file, a jury is waived and the cause submitted to the court sitting as a jury, upon an agreed statement of facts, heretofore filed in this cause. And the court sitting as a jury, after considering said agreed statement of facts and the law applicable thereto and hearing argument of counsel, took the case under advisement, and, on the 18th day of October, 1924, being fully advised in the premises, doth find the issues in favor of the defendant and against the plaintiff.

Wherefore, it is considered and adjudged that the said plaintiff take nothing by its suit, and that the said defendant do go thereof without day; and it is further considered and adjudged that the

said defendant do recover against the said plaintiff its costs and charges by it in its defense in this behalf expended to be taxed; and that said defendant have execution thereof.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Jan. 14, 1925

Now comes the plaintiff herein, Turner, Dennis & Lowry Lumber Company, and says that on the 8th day of November, 1924, this court entered judgment herein in favor of the defendant and against the plaintiff, in which judgment and the proceedings had prior thereto in this cause a penalty charge which was exacted and collected by defendant from plaintiff by the pretended authority of tariff schedules filed with the Interstate Commerce Commission was in error adjudged to be constitutional and valid against the claim of the plaintiff and that such exaction and collection of such penalty was in violation of and deprived plaintiff of rights guaranteed to it by the fifth amendment to the constitution of the United States; that through the erroneous construction and application of the constitution of the United States in this case by the court plaintiff was denied the equal protection of the laws and deprived of its property without due process of law, which errors and certain errors which will appear more in detail from the assignment of errors which is filed with this petition were committed to the prejudice of plaintiff, and feeling aggrieved by said judgment the above named Turner, Dennis & Lowry Lumber Company hereby prays for a writ of error from the said decision and judgment to the Supreme Court of the United States upon the grounds and for [fol. 15] the reasons set forth in the assignment of errors filed herewith, and it prays that its writ of error be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said judgment was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it be made.

Rees Turpin, Edward A. Haid, Attorneys for Plaintiff in Error.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 14, 1925

Now comes the plaintiff in the above entitled cause and files the following assignment of errors, upon which it will rely in its prosecution of the writ of error in the above entitled cause, from the judgment made and entered in said cause on the 8th day of November, 1924:

1. The court erred in not holding and deciding that the exaction and collection of the penalty charge of $10.00 a day in the manner and under the circumstances shown by the stipulated facts of this case denied plaintiff the equal protection of the laws and deprived plaintiff of its property without due process of law, all in violation of the fifth amendment to the constitution of the United States.

2. The court erred in not holding and deciding that the exaction and collection of the penalty charge of $10.00 a day in the manner shown by the stipulated facts of this case was without notice to plaintiff and without opportunity for hearing, and erred in holding that the published tariff without more was due notice to the plaintiff, and erred in holding that plaintiff was not deprived of its property without due process of law, in violation of the fifth amendment to the constitution of the United States.

3. The court erred in not holding and deciding that the exaction and collection of the penalty charge of $10.00 a day in the [fol. 17] manner and under the circumstances shown by the stipulated facts of this case was the usurpation of a legislative function, and in not holding and deciding that such exaction and collection was therefore unlawful.

4. The court erred in holding that plaintiff was not denied the equal protection of the laws and was not deprived of its property without due process of law in violation of the fifth amendment to the constitution of the United States by the exaction and collection of a penalty charge of $10.00 a day for detaining for the purpose of reconsignment a car loaded with lumber, when such exaction and collection was not applied to shipments of other commodities detained for the purpose of reconsignment in the same cars used at times for the shipment of lumber or in cars of the same kind as those used in the shipment of lumber, and was applied only to such cars when loaded with lumber, and only to cars loaded with lumber which were held for reconsignment, and did not apply to cars loaded with lumber or loaded with other commodities, and held for purposes other than reconsignment.

5. The court erred in holding and deciding that singling out shippers of lumber and exacting and collecting from them a pen-

alty of $10.00 a day for detaining cars which were reconsigned and relieving from such exaction and collection other shippers who detained the same cars when used for other commodities and reconsigned, in the manner shown by the stipulated facts of this case, did not deny plaintiff the equal protection of the laws and deprive it of its property without due process of law, all in violation of the fifth amendment to the constitution of the United States.

6. The court erred in holding and deciding that by exacting and collecting said penalty charge of $10.00 a day in the manner and under the circumstances shown by the stipulated facts of this case, defendant did not subject plaintiff and plaintiff's particular description of traffic to an undue or unreasonable prejudice or disadvantage [fols. 18 & 19] in violation of the act to regulate commerce, approved February 4, 1887, and the acts amendatory thereof and supplmentary thereto, also known as the Interstate Commerce Act, and in violation of the fifth amendment to the constituion of the United States.

7. The court erred in rendering and entering its judgment and decree in favor of the defendant and against the plaintiff because the stipulated facts of the case do not support such judgment.

8. The court erred in not rendering and entering a judgment and decree in favor of the plaintiff and against the defendant, awarding the plaintiff the relief prayed for in its petition.

9. The court erred in holding and deciding upon the stipulated facts of the case that under no aspect of the case can the plaintiff prevail in this action.

Wherefore, the appellant or plaintiff in error, Turner, Dennis & Lowry Lumber Company, prays that said judgment be reversed and that said District Court for the Western District of Missouri be ordered to enter a judgment reversing the decision of the lower court in said cause.

Rees Turpin, Edward A. Haid, Attorneys for Appelllant or Plaintiff in Error.

[fols. 20 & 21] In United States District Court

[Title omitted]

Order Allowing Writ of Error—Filed Jan. 14, 1925

On this 14th day of January, 1925, came plaintiff, by Rees Turpin and Edward A. Haid, its attorneys, and filed herein and presented to this court its petition praying for the allowance of a writ of error, and filed herein an assignment of errors intended to be urged by them, praying, also, that a citation be issued as provided by law, and that a transcript of the record proceedings and documents upon

which said judgment was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of such court in such cases made and provided, and that the proper order relating to the security to be required of it be made.

Now, upon consideration whereof, the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of Two hundred and Fifty Dollars ($250.00).

Arba S. Van Valkenburgh, Judge.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions—Filed Jan. 14, 1925

CAPTION

Be it remembered, that on the 17th day of September, 1924, at a stated term of said court the above entitled case came on for trial before the Honorable Arba S. Van Valkenburgh, one of the judges of said court, without a jury, the parties having filed with the clerk a stipulation in writing waiving a jury, and the case was submitted to the court by agreement of the parties on the pleadings and on agreed facts which the court adopted as a special finding of facts. The plaintiff appeared by Mr. Rees Turpin and Mr. Edward A. Haid, and the defendant appeared by Mr. Fred S. Hudson and Mr. J. N. Davis.

An agreed statement of facts was duly filed, made a part of the record and used in the trial of said cause, which, omitting caption and filing mark, was as follows:

"AGREED FACTS

"It is agreed between the parties hereto that in the trial of this cause the following facts shall be taken and considered as established with the same effect as if they had been proved at said trial by competent evidence, and shall be received subject to no objection except as to relevancy or materiality. At the trial either party may offer such additional or supplemental evidence as he may see fit.

"First. Plaintiff is a corporation organized and doing busi-[fol. 23] ness under the laws of the State of Missouri.

"Second. Defendant is a railroad corporation organized and doing business under the laws of the State of Wisconsin, engaged in the transportation of freight and passengers for hire in interstate commerce, and as such is subject to the provisions of the Interstate Commerce Act, approved February 4, 1887, and acts amendatory thereof and supplementary thereto.

"Third. On or about November 16, 1921, the St. Maries Lumber Company shipped a carload of lumber from St. Maries, Idaho, consigned to plaintiff at Aberdeen, South Dakota, loaded in Illinois Central car number 174767, which car was used, and was designed to be used, and was suitable for the carriage of a variety of commodities, lumber being customarily shipped in any variety or kind of car most available at the time and place and not in a car designed especially for the carriage of lumber.

"Fourth. Said car arrived at Aberdeen, South Dakota, on November 27, 1921, and on November 28, 1921, defendant notified plaintiff of the arrival thereof in accordance with the provisions of the National Car Demurrage Rules and Charges.

"Fifth. On December 5, 1921, plaintiff directed defendant to reconsign said car to the Central Warehouse Lumber Company at Minnesota Transfer, Minnesota.

"Sixth. Defendant reconsigned said car as requested and collected from the plaintiff, and plaintiff has paid and borne, a reconsignment charge amounting to $7.00; freight at the rate of 62½¢ per hundred pounds amounting to $359.69; demurrage at the rate of $2.00 per day for four days and $5.00 for the fifth day, amounting to $13.00; and a penalty charge of $10.00 per day for four days, amounting to $40.00. No other freight, reconsignment, demurrage or other charges were required by the lawfully published tariffs to be paid or collected for the transportation, reconsignment, holding, handling, [fol. 24] delivery, or other transportation or accessorial services performed in connection with said shipment.

"Seventh. At the time said shipment arrived at Aberdeen, South Dakota, and during the time that it was held there awaiting disposition orders, defendant and other common carrier railroads had on file with the Interstate Commerce Commission, in accordance with the provisions of the Interstate Commerce Act, a joint tariff entitled and generally known and referred to as the National Car Demurrage Rules and Charges. Said tariff provided, among other things, that when cars have reached destination and are held awaiting unloading or disposition, certain demurrage charges shall be paid as follows:

'After the expiration of free time allowed, the following charges per car, per day, or fraction of a day, will be made until car is released:

For each of the first four days, $2.

For each succeeding day, $5.'

"Said tariff also provided that

'Twenty-four hours' (1 day) free time will be allowed:

1. When cars are held for reconsignment, diversion, or reshipment, or held in transit on order of consignor, or owner'

"and also provided that time shall be computed as follows:

'On cars held for orders, surrender of Bill of Lading, or payment of freight charges, whether such cars have been placed in position to unload or not, time will be computed from the first 7 a. m. after the day on which notice of arrival is sent or given to the consignee or party entitled to receive same:'

"and also provided that

'Notice of arrival shall be sent or given consignee or party entitled to receive same by this railroad's agent in writing * * * within twenty-four hours after arrival of car and billing at destination * * * etc.'

"Eighth. During the period of federal control, to-wit: effective October 20, 1919, there was filed with the Interstate Commerce Commission, as provided by law, a tariff entitled, Penalties for Detention of Equipment, which provided that

[fol. 25] 'To prevent undue detention of equipment under present emergency, the following additional penalties for detention of equipment will apply:

* * * * * * *

On cars loaded with lumber held for reconsignment a storage charge of $10 per car will be assessed for each day or fractional part of a day that a car is held for reconsignment after 48 hours after the hour at which free time begins to run under the demurrage rules.

These charges will be assessed regardless of whether cars are held on railroad hold tracks or transfer tracks, including consignees or other private sidings, and will be in addition to any existing demurrage and storage charges.'

"Ninth. After the termination of federal control defendant and other common carrier railroads continued to maintain said provision in the published tariffs until March 13, 1922, when it was cancelled in pursuance of a decision and order of the Interstate Commerce Commission rendered on February 11, 1922, in a case entitled American Wholesale Lumber Association vs. Director-General, as agent, Aberdeen & Rock Fish Railroad Company, et al., 66 I. C. C., 393, in which case the defendant herein was a party defendant, and any official publication of it purporting to have been printed by the Government Printing Office may be referred to by the court or by counsel with the same effect as if it were in evidence.

"Tenth. At the times mentioned in plaintiff's petition in this case the penalty or storage charge described in paragraphs eight and ninth hereof was applied to shipments of lumber detained for the purpose of reconsignment and was not applied to shipments of other commodities detained for the purpose of reconsignment in the same cars used at times for the shippment of lumber or in cars of the same kind as those used in the shipment of lumber, and was applied only to such cars when loaded with lumber, and only to cars loaded with lumber which were being held for reconsignment, and

did not apply to cars loaded with lumber or loaded with other commodities and held for purposes other than reconsignment.

"Eleventh. Notice of arrival of the car herein involved having been given on November 28, 1921, free time began to run at 7 A. M. [fol. 26] November 29, 1921. The penalty charge began to accrue, if lawful, on December 1, 1921. Reconsigning instructions were given defendant on December 5, 1921, and it therefore assessed and collected the penalty charge for December 1, 2, 3 and 4, 1921, at the rate of $10.00 per day, or an aggregate of 40.00.

"Twelfth. Said charge was exacted from plaintiff and plaintiff was compelled to pay it in the manner in which tariff charges are collected and paid and defendant required payment of said charge as a condition of the delivery of said car, and plaintiff was not given notice that such charge would be assessed other than such notice as might be chargeable to it by law by reason of the publication and filing of the published traiffs, nor was plaintiff given an opportunity to show cause, if any it had, why said charge should not be assessed against the shipment herein described, or against plaintiff, or in the manner herein described.

Rees Turpin, Edward A. Haid, Attorneys for Plaintiff. Fred S. Hudson, Attorney for Defendant."

The following further statement was made by Mr. Edward A. Haid, to-wit:

"Mr. Davis has requested, and we have consented to stipulate into the record in this case, the following extracts from the decision of the Interstate Commerce Commission, 'The penalty charge applied originally on lumber only, and was established by the Director General on October 20, 1919. The schedule naming the charge stated that it was " to prevent undue detention of equipment under present emergency" and "is in addition to any existing demurrage or storage charge." On December 1, 1919, it was published in the uniform demurrage tariff, and was made applicable on lumber, shingles, poles, piling, mine timber, box, barrel or crate material, [fol. 27] and other forest products not further finished than sawed or dressed, and on all forest products on which the lumber rate applies. All these commodities will hereinafter be termed lumber Prior to August 19, 1920, the penalty charge was applied on cars held on Sundays and legal holidays. On that date the charge was made subject to the provisions of the national car demurrage rules which provide that Sundays and legal holidays shall be excluded in computing time. By tariff supplement effective February 29, 1920, the penalty charge was made to expire June 1, 1920, and by later schedules extended so as to expire with the close of business January 1, 1921. On December 2, 1920, schedules were filed to continue the penalty charge after January 1st, 1921, without expiration date. These schedules were protested by complainant and others, but we permitted them to go into effect.'"

No further evidence was introduced by either party.

Thereupon the court on the 18th day of October, 1924, filed an opinion declaring that under no aspect of the case can plaintiff prevail in this action and that the finding accordingly is for the defendant on all counts and directed the entry of judgment in favor of the defendant in accordance with the views therein expressed and on the 8th day of November, 1924, in pursuance of said order and direction of the court the clerk of said court entered judgment against the plaintiff and in favor of the defendant, to all of which actions of the court plaintiff by its said attorneys excepted and still excepts for the reason that plaintiff is thereby denied the equal protection of the laws and deprived of its property without due process of law, in violation of the fifth amendment to the constitution of the United States; and the court duly allows the plaintiff an exception in that regard.

ORDER SETTLING BILL OF EXCEPTIONS

And forasmuch as the matters and things hereinbefore set forth do not fully appear of record, and to the end that the same may [fols. 28 & 29] be made a part of the record herein, the plaintiff presents the foregoing as its bill of exceptions in this cause, and prays that the same may be settled, allowed, signed and certified by the judge of this court as part of the record herein; which is accordingly done this 14th day of January, 1925, by the Honorable Arba S. Van Valkenburgh, as judge of said court, under his hand and seal.

Arba S. Van Valkenburgh, District Judge.

O. K. Fred S. Hudson, Atty. for Defendant. Rees Turpin, Atty. for Plaintiff.

[fols. 30-32] BOND ON WRIT OF ERROR FOR $250.00—Approved and filed Jan. 15, 1925; omitted in printing

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[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed Jan. 17, 1925

It is hereby stipulated and agreed by and between the parties to this cause that the clerk shall prepare and certify a transcript of the record in the above entitled cause to be filed in the office of the clerk of the Supreme Court of the United States under the appeal by writ of error heretofore perfected to said court, and include in said transcript the following pleadings, proceedings, and papers on file herein, which shall constitute the transcript of record on writ of error, to-wit:

The petition and answer;
The stipulation waiving a jury;
The agreed statement of facts filed in this cause on the 17th day of September, 1924, and the record entry showing the filing of it.
The bill of exceptions settled and approved by the court;
The memorandum decision of the court;
The judgment and decree entered on the 8th day of November, 1924;
The petition for a writ of error, the assignment of errors, the order allowing writ of error and the writ of error, the citation in error;
Appeal bond;
This stipulation and the clerk's certificate.

[fol. 34] It is further agreed that in printing the record it shall be sufficient to set out the record entry showing the filing of the agreed statement of facts and recite that it is printed in full at a later page in the bill of exceptions, and said agreed statement of facts shall be considered with the same effect as if it had been printed in full in both places.

Chicago, Milwaukee & St. Paul Railway Company hereby waives citation on the writ of error herein and Fred S. Hudson and J. N. Davis enter their appearance in the Supreme Court of the United States as attorneys for said defendant in error.

Rees Turpin, Edward A .Haid, Attorneys for Plaintiff. J. N. Davis, Fred S. Hudson, Attorneys for Defendant.

Rees Turpin, of Kansas City, Missouri; Edward A. Haid, of St. Louis, Missouri, Attorneys for Plaintiff in Error. J. N. Davis, of Chicago, Illinois; Fred S. Hudson, of Kansas City, Missouri, Attorneys for Defendant in Error.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

During the period of federal control there was filed with the Interstate Commerce Commission, to be effective October 20th, 1919, a tariff entitled "Penalties for Detention of Equipment" which provided that

"To prevent undue detention of equipment under present emergency, the following additional penalties for detention of equipment will apply:

On cars loaded with lumber held for reconsignment a storage charge of $10 per car will be assessed for each day or fractional part of a day that a car is held for reconsignment after 48 hours after the hour at which free time begins to run under the demurrage rules.

These charges will be assessed regardless of whether cars are held on railroad hold tracks or transfer tracks, including consignees or

other private sidings, and will be in addition to any existing demurrage and storage charges."

After the termination of federal control the defendant and other common carrier railroads continued to maintain said provision in the published tariffs until March 13, 1922, when it was cancelled in pursuance of a decision and order of the Interstate Commerce Commission rendered on February 11, 1922. The Interstate Commerce Commission found that the charge, when made and while in force, was reasonable because of the great car shortage which then existed and which was aggravated by those shipping lumber upon consignment, but that owing to the fact that at the date of the order of cancellation a large surplus of serviceable empty cars existed, and, gen- [fol. 36] erally speaking, there was then no congestion in the country, the penalty in question was no longer necessary. On November 16, 1921 a car load of lumber was shipped to plaintiff at Aberdeen, South Dakota, and on November 28, 1921, the defendant notified plaintiff of the arrival thereof in accordance with the provisions of the national car demurrage rules and charges. On December 5, 1921 plaintiff directed defendant to reconsign said car to the Central Warehouse Lumber Company at Minnesota Transfer, Minnesota. Defendant charged, and plaintiff paid, this charge of $10 per day for four days in addition to the previously existing demurrage charge. Plaintiff now seeks to recover back these payments, aggregating $40.00, on the ground that this additional charge was unlawful and beyond the power of the carrier to assess.

The case was tried upon an agreed statement of facts before the court,—a jury having been waived in writing. The shipment, dates of storage, and amounts paid are all uncontroverted; the sole question being whether the charge was lawfully assessed and whether under the facts presented the plaintiff could, in any event, recover from the defendant in this action.

It is conceded that the privilege of reconsignment is accorded to shippers by tariff and traffic arrangements at the through rate in effect from the original point of shipment to the ultimate destination; a privilege which relieves the shipper from paying the higher combination of the local rate from the original point of origin to the first de-tination plus the local rate from the latter point to the ultimate destination. It is further conceded that demurrage charges for delay in releasing cars after a certain reasonable time specified in tariffs is not only legitimate but salutary in order that cars may be kept in commission for the accom-odation of shippers and carriers alike,—in other words, the general public. The purpose of demurrage charges is to promote car efficiency by penalizing undue [fol. 37] detention of cars. In fixing the free time the framers of the demurrage code adopted an external standard; that is, they refused to allow the circumstances of the particular shipper to be considered. The framers of the code made no attempt to equalize conditions among shippers.

(Pennsylvania R. R. Co. vs. Kittanning Iron & Steel Manufacturing Co., 253 U. S. 319-323).

It has been universally held that the duty of a railroad company as a carrier ends when the shipment is delivered to the consignee; that storage upon tracks is no part of the contract. It is recognized that in the absence of some imposed charge therefor shippers would use the cars and tracks of the carrier for storage and warehouse purposes to suit their convenience in resale and trans-shipment, thereby imposing a burden upon the carriers and causing the detention and withdrawal of cars from other pressing public uses; all of which would be reflected in increased cost of transportation and embarrassment to general marketing. Reasonable demurrage charges have, therefore, uniformly been upheld upon two grounds: Compensation to the carrier for storage and loss of use of its equipment, and a penalty upon the offending shipper as a deterrent from the adoption of such practices. So far from increasing the revenues of the carrier in proportion to the demurrage charges exacted, experience has proved that substantial demurrage charges have been effective in promoting a speedier release of the rolling stock, thereby reducing the number of cars subject to the charge or penalty. The carriers prefer that their cars should be kept in the channels of transportation rather than in detention subject to demurrage, for the reason that thereby the revenue from hauling is increased, and for the further important reason that they are required, so far as possible, to have cars on hand to meet the demands of the shipping public generally. These facts and principles have been repeatedly found and announced by the Interstate Commerce Commission in its in- [fol. 38] vestigations and have been uniformly recognized by the courts.

Under the Act to Regulate Commerce, as amended by the Hepburn Act of 1906, train transportation embraces all services in connection with the shipment, including storage of goods after arrival at destination; and so far as interstate carriers by rail are concerned the entire body of such services is included together under that single term and is subjected to the provisions of the Act respecting reasonable rates and the like.

(Cleveland & St. Louis Ry. vs. Dettlebach, 239 U. S. 588). And, accordingly, it is made the duty of all common carriers subject to the Act to establish, observe and enforce a just and reasonable classification of property for transportation with reference to which rates, tariffs, regulations or practices are, or may be, made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, and it is the duty of the carrier to have just and reasonable rules and regulations in all matters relating to or connected with the receiving, handling, transporting, storing and delivering of property subject to the Act.

(Section 1, Par. 6 Interstate Commerce Act, 41 Stat. L. 474.)

Accordingly, every common carrier subject to the Interstate Commerce Act must file with the Interstate Commerce Commission schedules showing all rates, fares and charges for the transportation of property. Such tariffs shall state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed,

and any rules or regulations which in anywise change, affect or determine any part, or the aggregate, of such rates, fares and charges.
(Sec. 6, Interstate Commerce Act; 24 Stat. L. 379; 25 Stat. L. 855; 34 Stat. L. 584).

And the Interstate Commerce Commission may, upon complaint, [fol. 39] or upon its *own initiative, determine whether any rate*, fare or charge, or joint classification, regulation, or practice whatsoever, of any carrier, or carriers, is unreasonable in violation of Section 1, or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the Interstate Commerce Act.
(41 Stat. L. 484).

And having filed such a schedule the carrier is required to adhere thereto without deviation unless otherwise ordered. Demurrage charges, therefore, or any regulation or practice in the nature thereof, must be duly filed as a tariff, or as part of a tariff, with the Interstate Commerce Commission. That was done in this case. It follows that any action of Commission or court with respect to such charges must be governed by the rules applicable to tariff schedules generally.

Plaintiff charges that the infliction and collection of these penalty charges was unlawful because

1. Congress could not delegate its legislative function of prescribing a penalty to either defendant or the Interstate Commerce Commission and has not even undertaken to do so.

2. Inflicting a penalty on plaintiff without notice and without opportunity for hearing of any kind deprived plaintiff of its property without due process.

3. Singling out shippers of lumber and punishing them for detaining cars which were reconsigned and relieving from such punishment other shippers who detained the same cars when used for other commodities and reconsigned denied plaintiff the equal protection of the laws and deprived it of its property without due process.

4. Defendant subjected plaintiff and plaintiff's particular description of traffic to an undue or unreasonable prejudice or disadvantage in violation of the Act to regulate commerce.

If this suit be regarded as an action for reparation, as commonly understood, it would seem that the contention of the defendant that it should be dismissed for want of jurisdiction should be sustained. No action for reparation for exactions of this nature can be maintained in any court, federal or state, in the absence of an appropriate finding and order of the Interstate Commerce Commission; and this [fol. 40] rule applies to suits for recovery of unreasonable rates, as also to suits for recovery of rates as discriminatory, and demurrage charges fall within the same category. In this case it does not appear that any claim for reparation was filed with or urged before the

Commission. But, in any event, the Commission has made no order for reparation, but on the contrary has held that this demurrage charge was reasonable and lawful.

(Hormel & Co. vs. Chicago, M. & St. P. Ry. Co. et al. (C. C. A.) 283 Fed. 915;
C. B. & Q. R. Co. vs. Merriam & Millard Co., (C. C. A.) 297 Fed. 1;
Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426;
Robinson vs. Baltimore & O. R. Co., 222 U. S. 506;
Northern Pacific Ry. vs. Solum, 247 U. S. 477;
Loomis vs. Lehigh Valley R. R. Co., 240 U. S. 43;
Texas & Pacific Ry. Co. vs. American Tie & Timber Co., 234 U. S. 138.
Morrisdale Coal Co. vs. Penn. R. R. Co., 230 U. S. 304;
Great Northern Ry. Co., et al. vs. Merchants Elevator Co., 259 U. S. 285-291;
Hite et al. vs. Central R. of New Jersey, (C. C. A.) 171 Fed. 370).

There was no evidence before the Commission, and none before this court, to warrant a finding that the charge was unreasonable, nor that it worked discrimination unless it be as matter of law in a respect hereinafter to be considered.

"Regulations which are primarily within the competency of the Interstate Commerce Commission are not subject to judicial supervision or enforcement until that body has been properly afforded an opportunity to exert its administrative functions."

(Baltimore & Ohio R. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481.)

And in determining whether an order of the Interstate Commerce Commission shall be suspended or set aside (and in this case a regulation of the carrier), power to make, and not the wisdom of the order, is the test.

(Interstate Commerce Commission vs. Illinois Central R. R. Co., 215 U. S. 452; Great Northern Ry. Co. vs. Merchants Elevator Company; 259 U. S. 285.)

It would seem then, that in this case the court is confined to a consideration of the question of whether this tariff schedule is within the scope of the authority under which it purports to be made, and [fol. 41] if not, whether the plaintiff can recover.

Plaintiff invokes the spirit of the Fifth and Fourteenth Amendments of the Constitution of the United States claiming that its property has been taken without due process and that it has been denied the equal protection of the laws. It is conceded that Article 5 is a limitation upon the federal government as such and that Article 14 applies to the states. The demurrage charge complained of is assessed by no statute, state or national, but it is presumed that the plaintiff bases its contention upon the holding that a published

tariff, so long as it is in force, has the effect of a statute and is binding alike on carrier and shipper. (Pennsylvania R. R. Co. vs. International Coal Mining Co., 230 U. S. 184).

Taking up now the claims of plaintiff that Congress could not delegate its legislative function of prescribing a penalty to either defendant or the Interstate Commerce Commission and has not undertaken to do so, and that inflicting a penalty on plaintiff without notice and without opportunity for hearing of any kind deprived plaintiff of its property without due process of law, it is to be observed that the Interstate Commerce Commission at least has prescribed no penalty. The railroad company, by its filed tariff, has assessed a penalty in the nature of a demurrage charge, but this can in no sense be regarded as in the nature of a penal law imposing punishment for an offense and coming, therefore, within the purview of the constitutional guaranties. It has been seen that the establishment of a demurrage charge in the nature of a penalty is within the power of the railroad under the Interstate Commerce Act. Its collection takes place in due course as all other rates and charges for transportation and its incidents. It requires no hearing as a prerequisite to its enforcement. The means for correcting it, if it be unreasonable, arbitrary or discriminatory, are provided by the statute which satisfies the demand for due process. Such charges or [fol. 42] penalties, in so far as they are penalties, do not partake of the nature of the offenses defined in the Interstate Commerce Act for which punishment may be inflicted in the usual course of criminal procedure. The published tariff, without more, is due notice of the charge to all shippers who bring themselves within its terms.

This exaction while entitled "Penalties for Detention of Equipment," and providing a storage charge of $10 per car under certain conditions, was, in effect, nothing more than an additional demurrage charge in the nature of an amendment to those already existing. While it is true that demurrage charges involve two elements, the one of compensation and the other of penalty, the amount applicable to compensation and that applicable to penalty, is not proportioned. The case is not otherwise than if the original demurrage charges had been entirely abrogated, or had never existed, and such charges had been established by filed tariff embracing all those previously in effect and the $10.00 charge as well. There would then have been presented, not an exaction beyond the power of the carrier and of the commission, but one subject to supervision and review, if desired, touching its reasonableness or its tendency to discrimination. Purely administrative questions. It is not claimed that the charge is so grossly unreasonable as to be confiscatory, and certainly no evidence to that effect is before us.

It is next urged that the charge singles out shippers of lumber and punishes them for detaining cars which were reconsigned and relieves from such punishment other shippers who reconsigned such cars when used for other commodities. It is also pointed out that this schedule singles out shippers of lumber who reconsign shipments and exempts other lumber dealers who ship without recon-

signment. It is claimed that these things deny to plaintiff the equal protection of the laws and deprives it of its property without due process.

[fol. 43] These criticisms involve simply the question of classification. It is well understood that a classification when made must be based upon some reasonable ground, something which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. (Gulf, Colorado and Santa Fe Ry. Co. vs. Ellis, 165 U. S. 150). Such classifications are not unusual in the establishment of railroad rates, and in their determination great latitude has been indulged. Many different things must be taken into consideration both by the carrier and by the commission; the welfare and advantage of the carrier and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried. The attention of the Commission is not to be confined to the advantage of shippers or merchants in the matter of location or the character of business. Differences in freight rates are made because of differences in environment, local conditions and the character of the commodity carried. As the Supreme Court says in Texas & Pacific Ry. Co. vs. Interstate Commerce Commission, 162 U. S. 197-219:

"In deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous', whether the kinds of traffic were 'like,' whether the transportation was effected under 'substantially similar circumstances and conditions.' To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not unjust. Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the Act, be regarded by the commission."

To this should be added that the rights of the general shipping public are also to be taken into account, the demand for cars the necessities for marketing, the emergencies of different classes of commodities and the manner in which business is done. It appears in this case [fol. 44] that a great shortage of cars existed; that this evil was increased by the practice of a large body of lumber dealers to detain cars for an unreasonable period while they were negotiating sales to be effected through reconsignment. From the report of the Commission in this case (I. C. C. Report 66 at page 406) it appears complainants insisted that:

"Operators of the small mill, who are limited as to capital and credit, are unable to carry lumber in stock for long periods; that it is impossible for them to sell on credit; that their limited output will not warrant the heavy cost of a sales organization; that they are

unacquainted with traffic matters and market conditions; that they must ship their lumber as soon as it is available and must realize their return quickly; and that therefore it is vital to the continuance of their business to have the right to reconsign without any restriction of that right by the imposition of a penalty charge when cars are delayed beyond a specified limit."

It was also urged upon the Commission

"That the unrestricted use of the reconsignment privilege is beneficial to the small lumber retailer in that, by being able to purchase cars of lumber in transit, quickly available to meet his needs, he requires less capital and less yard space, and can maintain a better rounded as well as a smaller stock on hand, etc."

It is evident from this that by such use of railway facilities such dealers sought to escape the natural disadvantage of small capital and inadequate facilities of their own. Of such reasons the law can take no cognizance. It does not seek to equalize natural conditions by special privileges and advantages to an individual shipper or class of shippers. The framers of the demurrage code refused to allow the circumstances of the particular shipper to be considered and refused to exempt shippers from demurrage charges because of conditions peculiar to them.

(Pennsylvania R. R. Co. vs. Kittanning Co., 253 U. S. 323-324;
Texas & Pacific Ry. Co. vs. Interstate Commerce Commission, 162 U. S. 197-218).

The carrier is not called upon to contribute its trackage and equipment for such purposes, nor is the shipping public required to suffer the resulting loss of transportation facilities. As said by the Circuit Court of Appeals of this Circuit in Missouri Pacific Ry. Co. vs. Union Stockyards Co., (C. C. A.) 204 Fed. 757-759:

[fol. 45] "The imposition of demurrage implies delay through negligence or inattention, or a retention for personal uses, whereby the proper office of the cars in transportation is impaired."

No discrimination appears upon the face of this tariff. Only shippers of the same class, engaged in the same business, and who do business in the same way, are affected and all such are affected alike. There is no competition between lumber dealers and dealers in other commodities. The retention of cars upon consignments used for other commodities was found to be comparatively negligible. Shippers of lumber who do not reconsign cars are, of course, not subject to this charge; if they do practice reconsignment, then they are subject to the same penalties. The law cannot be made the instrument of creating an equilibrium between shippers differently situated to the disadvantage of the carrier and the general shipping public. This charge, so far as appears in this case, was imposed under authority of law, not for the purpose of inflicting a burden upon any class

of dealers, but for the paramount purpose of affording greater facilities for transportation to the entire business public. Under no aspect of the case can the plaintiff prevail in this action, and the finding accordingly is for the defendant upon all counts. A judgment entry may be prepared in accordance with the views herein expressed.

Kansas City, Missouri, October 18, 1924.

Arba S. Van Valkenburgh, District Judge.

[fol. 46] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true and correct copy of the record, bill of exceptions, assignment of errors and all proceedings in the case wherein Turner, Dennis & Lowry Lumber Company is plaintiff and Chicago, Milwaukee & St. Paul Railway Company is defendant, No. 5703, as fully as the same remains on file and of record in my office, in accordance with stipulation filed herein and made a part hereof.

I further certify that the original Citation and Writ of Error are prefixed hereto and returned herewith.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at office in Kansas City in said district this 30th day of January, A. D. 1925.

Edwin R. Durham, Clerk U. S. District Court, by H. C. Spaulding, Deputy Clerk. (Seal of the United States District Court of Missouri, Western Division, Western District.)

Endorsed on cover: File No. 30,861. W. Missouri D. C. U. S. Term No. 271. Turner, Dennis & Lowry Lumber Company, plaintiff in error, vs. Chicago, Milwaukee & St. Paul Railway Company. Filed February 10th, 1925. File No. 30,861.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

TURNER, DENNIS & LOWRY LUMBER COMPANY,
Plaintiff in Error,

v.

No. 271

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

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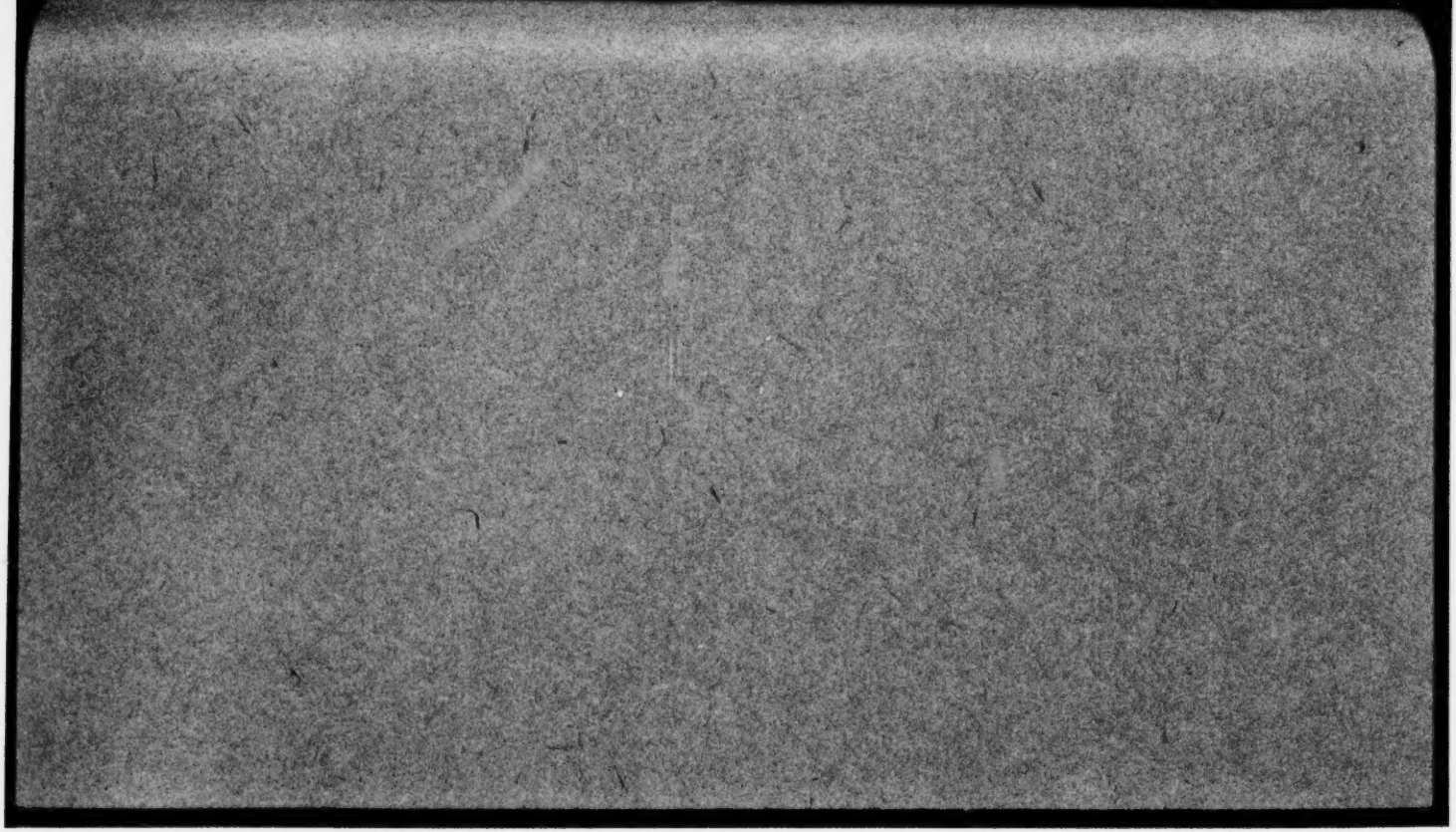

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LIST OF CASES REFERRED TO.

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The opinion delivered below in this case will be found in 2 (2d) Fed. Rep., 291.

This is an action instituted in the District Court for the Western District of Missouri, Western Division, to recover from the defendant railway company as damages the full amount of a penalty charge which it assessed and

collected by the pretended authority of tariff schedules filed with the Interstate Commerce Commission. The case was tried before Honorable Arba S. Van Valkenburgh, District Judge, without a jury, and resulted in a judgment for the defendant entered on the 8th day of November, 1924 (R., 6). Plaintiff was allowed a writ of error to this court on January 14, 1925 (R., 9).

The right to recover is founded upon the argument that the tariff schedule is not within the scope of the authority under which it purports to have been made and that the penalty was prescribed, inflicted and exacted unlawfully and in violation of the Constitution of the United States. The petition charges that plaintiff was denied the equal protection of the laws and deprived of its property without due process of law by the acts complained of (R., 2-3-4). The court in its opinion expressly considered the construction and application of the Constitution of the United States (R., 18). The petition for writ of error (R., 7) and the assignment of errors (R., 8) complain of errors in that respect.

The statutory provision under which the jurisdiction of this court is invoked is Section 238 of the Judicial Code as amended by the Act of January 28, 1915, which was in effect at the time the judgment was entered and when the writ of error was allowed, and Section 14 of the Amendments to the Judicial Code approved February 13, 1925.

The case was presented upon an agreed statement of facts (R., 10-13). The penalty charge was paid under compulsion, no special damage is proved, and if, as plaintiff in error insists, the exaction was unlawful, the measure of damages is the full amount of the payment.

There is no issue of fact and the sole question is the legal conclusion that should be drawn from the agreed facts. The issue presented is not the reasonableness or unreasonableness of the penalty, the wisdom of it or the lack of wisdom, but the authority of the carrier or the Commission to inflict the penalty in any event. An issue of law, therefore, is presented which cannot be finally determined by the Inter-state Commerce Commission but can be determined only by a court.

The petition and answer will be found on pages 2 to 5 of the transcript of the record. The agreed facts will be found on pages 10 to 13. The opinion of the District Judge will be found on pages 15 to 23. The assignment of errors will be found on pages 8 and 9.

As appears from the pleadings and the agreed facts, on or about November 16, 1921, the St. Maries Lumber Company shipped a car load of lumber from St. Maries, Idaho, consigned to plaintiff at Aberdeen, South Dakota, loaded in car I. C. 174767, a car used, and designed to be used, and suitable for the carriage of a variety of commodities, lumber being customarily shipped in any variety or kind of car most available at the time and place and not in a car designed especially for the carriage of lumber. This car arrived at Aberdeen, South Dakota, on November 27, 1921; on November 28 defendant notified plaintiff of its arrival and on December 5 plaintiff directed defendant to reconsign it to the Central Warehouse Lumber Company at Minnesota Transfer, Minnesota. Defendant reconsigned the car as requested and collected a reconsignment charge amounting to $7.00, a freight charge amounting to $359.69 and a demurrage charge at the rate of $2.00 per day for four days and $5.00 for the fifth

day, amounting to $13.00. The propriety of these charges is not questioned, but defendant also inflicted and exacted a penalty charge of $10.00 per day for four days, amounting to $40.00, in addition to the demurrage charges for the same four days, and the authority so to do is the question presented by this case.

Defendant seeks to justify the infliction and exaction of this penalty by a tariff originally filed with the Interstate Commerce Commission during the period of federal control entitled, "Penalties for Detention of Equipment", which provided that:

> "To prevent undue detention of equipment under present emergency, the following additional penalties for detention of equipment will apply:
>
> * * * On cars loaded with lumber held for reconsignment a storage charge of $10 per car will be assessed for each day or fractional part of a day that a car is held for reconsignment after 48 hours after the hour at which free time begins to run under the demurrage rules.
>
> These charges will be assessed regardless of whether cars are held on railroad hold tracks or transfer tracks, including consignees or other private sidings, and will be in addition to any existing demurrage and storage charges."

After the termination of federal control defendant and other common carrier railroads continued to maintain said provision in the published tariffs until March 13, 1922, when it was cancelled in pursuance of a decision and order of the Interstate Commerce Commission rendered on February 11, 1922, in a case entitled, *American Wholesale Lumber Association* v. *Director General as agent, Aberdeen & Rock Fish Railroad Company et al.*, 66 I. C. C.,

393. That proceeding, to which defendant was a party, was brought to cancel that part of the tariff relating to the penalty and was not brought to recover penalties which had already been inflicted and exacted.

This shipment was made and the claim arose after the termination of federal control and the penalty was not assessed by the Director General or by virtue of any extraordinary authority which Congress may have undertaken to confer upon the Director General, but was assessed and collected by defendant railway company.

This court is doubtless familiar with what is termed "reconsignment". It is a privilege or right enjoyed by shippers of sending a car to a designated destination and, either before or after arrival at the billed destination, ordering it forwarded to a new destination at the through rate (plus a charge for the privilege and service of reconsignment) in effect from the original point of shipment to the ultimate destination. It is distinguished from a shipment which is accepted at the original destination and rebilled to a new destination at the combination of the local rate from the original point of origin to the first destination plus the local rate from the original destination to the ultimate destination.

We will briefly state the position of plaintiff in error. From the agreed facts it appears that defendant in error singled out shippers of lumber and punished them for detaining cars for the purpose of reconsignment, while it relieved from such punishment other shippers who detained the same cars for reconsignment when they were loaded with commodities other than lumber; and also relieved from such punishment shippers of lumber who de-

tained the same cars, loaded with lumber, for purposes other than reconsignment. The carrier assumed a power it did not have and which could not lawfully have been conferred upon it. Congress alone has authority to prescribe penalties; neither defendant in error nor the Interstate Commerce Commission has that power, and Congress could not, and has not undertaken to, delegate to either its legislative function of prescribing a penalty. The penalty was inflicted on plaintiff without notice and without opportunity for hearing of any kind. The enforcement of the penalty in the manner and under the circumstances shown denied plaintiff the equal protection of the laws and deprived it of its property without due process of law.

Section 9 of the Interstate Commerce Act authorizes any person claiming to be damaged by any common carrier subject to the provisions of that act to either make complaint to the Commission or bring suit in his own behalf for the recovery of the damages for which such common carrier may be liable under the provision of the act, in any district court of the United States of competent jurisdiction. No claim growing out of the shipment or the penalty involved in this suit has been filed with the Interstate Commerce Commission, and the charges sued for in this action have never been involved in any proceeding before the Interstate Commerce Commission.

At the times mentioned in the petition the penalty of $10.00 per day was applied to shipments of lumber detained for the purpose of reconsignment and was not applied to shipments of other commodities detained for the purpose of reconsignment. The car which was used in the shipment in question here was used, and was designed

to be used, and was suitable for the carriage of a variety of commodities, lumber being customarily shipped in any variety or kind of car most available at the time and place and not in a car designed especially for the carriage of lumber. When cars loaded with lumber were detained for the purpose of being reconsigned, the penalty of $10.00 per day was applied; when the same cars loaded with other commodities were detained for the purpose of being reconsigned, the penalty was not applicable under the tariff schedule and was not applied. When the same cars were loaded with lumber or loaded with other commodities and were detained for any purpose other than reconsignment, the penalty was not applicable and was not applied. To illustrate, if an empty car was ordered for loading and was detained beyond the free time allowed by the tariffs for loading, demurrage charges only, and no penalty charges, were assessed. If a shipment reached destination and was held beyond free time for the purpose of unloading, demurrage charges only, and no penalty charges, were assessed. If a shipment reached destination and was held beyond free time awaiting surrender of a shipper's order bill of lading, demurrage charges only, and no penalty charges, were assessed. If a shipment reached destination, was held beyond free time, and then a new bill of lading taken out consigning it to another destination, demurrage charges only, and no penalty charges, were assessed; but if the same shipment was reconsigned instead of being rebilled, the penalty charge was assessed in addition to the demurrage charge.

ASSIGNMENT OF ERRORS.

All of the assignments of errors are intended to be urged. They appear on pages 8 and 9 of the record as follows:

1. The court erred in not holding and deciding that the exaction and collection of the penalty charge of $10.00 a day in the manner and under the circumstances shown by the stipulated facts of this case denied plaintiff the equal protection of the laws and deprived plaintiff of its property without due process of law, all in violation of the fifth amendment to the constitution of the United States.

2. The court erred in not holding and deciding that the exaction and collection of the penalty charge of $10.00 a day in the manner shown by the stipulated facts of this case was without notice to plaintiff and without opportunity for hearing, and erred in holding that the published tariff without more was due notice to the plaintiff, and erred in holding that plaintiff was not deprived of its property without due process of law, in violation of the fifth amendment to the constitution of the United States.

3. The court erred in not holding and deciding that the exaction and collection of the penalty charge of $10.00 a day in the manner and under the circumstances shown by the stipulated facts of this case was the usurpation of a legislative function, and in not holding and deciding that such exaction and collection was therefore unlawful.

4. The court erred in holding *that plaintiff* was not denied the equal protection of the laws and was not deprived of its property without due process of law in violation of the fifth amendment to the constitution of the United States by the exaction and collection of a penalty charge of $10.00 a day for detaining for the purpose of reconsignment a car loaded with lumber, when such exaction and collection was not applied to shipments of other commodities detained for the purpose of reconsignment in the same cars used at times for the shipment of lumber or in cars of the same kind as those used in the shipment of lumber, and was applied only to such cars when loaded with lumber, and only to cars loaded with lumber which were held for reconsignment, and did not apply to cars loaded with lumber or loaded with other commodities, and held for purposes other than reconsignment.

5. The court erred in holding and deciding that singling out shippers of lumber and exacting and collecting from them a penalty of $10.00 a day for detaining cars which were reconsigned and relieving from such exaction and collection other shippers who detained the same cars when used for other commodities and reconsigned, in the manner shown by the stipulated facts of this case, did not deny plaintiff the equal protection of the laws and deprive it of its property without due process of law, all in violation of the fifth amendment to the constitution of the United States.

6. The court erred in holding and deciding that by exacting and collecting said penalty charge of $10.00 a

day in the manner and under the circumstances shown by the stipulated facts of this case, defendant did not subject plaintiff and plaintiff's particular description of traffic to an undue or unreasonable prejudice or disadvantage in violation of the act to regulate commerce, approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, also known as the Interstate Commerce Act, and in violation of the fifth amendment to the constitution of the United States.

7. The court erred in rendering and entering its judgment and decree in favor of the defendant and against the plaintiff because the stipulated facts of the case do not support such judgment.

8. The court erred in not rendering and entering a judgment and decree in favor of the plaintiff and against the defendant, awarding the plaintiff the relief prayed for in its petition.

9. The court erred in holding and deciding upon the stipulated facts of the case that under no aspect of the case can the plaintiff prevail in this action.

BRIEF OF THE ARGUMENT.

The general scope of both the facts and the argument appears from the preceding statement. The agreed facts are fully set out on pages 10 to 13 of the record and the argument will follow in detail in subdivisions with citations.

I.

The trial court erred in not holding and deciding that the exaction and collection of the penalty charge in the manner and under the circumstances shown by the stipulated facts were the usurpation of a legislative function and therefore unlawful.

We respectfully submit that the learned trial judge misconceived the essential character of the penalty here under consideration. We do not attack the established demurrage charges; that is not necessary to our point. We insist that the principle which justifies demurrage charges as they are collected under the Uniform Demurrage Code does not authorize this charge which is specifically designated in the tariff under consideration here as "penalties for detention of equipment" and declared to be "in addition to any existing demurrage and storage charges." To this we add the further principle stated by the Supreme Court of Michigan in *Grand Rapids & Indiana Railway Co.* v. *Cobbs & Mitchell*, 168 N. W., 961, as follows: "A carrier may not work discrimination

through demurrage charges any more than it may work discrimination through a charge for line haul."

On November 28 plaintiff was notified of the arrival at Aberdeen, South Dakota, of a car of lumber consigned to itself at that point, and on December 5 it directed that it be reconsigned to Central Warehouse Lumber Company at Minnesota Transfer, Minnesota, and the car was reconsigned as requested. A reconsignment charge was paid; the tariff freight rate was paid and demurrage for five days was paid. In addition to all these charges defendant inflicted and collected a penalty charge of $10.00 a day for four of the days for which it also paid demurrage (R. 11). The reconsignment charge was a compensation for the privilege and service of reconsignment. The freight charge was compensation for the carriage. The demurrage charge was partly compensation for the use of the car while detained and partly a charge in excess of what was reasonable for the use of the car made to deter shippers from keeping cars and using them for storage instead of sending them back into transportation. (*New York Hay Exchange Assn.* v. *Pennsylvania R. R. Co. et al.*, 14 I. C. C., 178, 184, 185; Advance and Demurrage Charges, 25 I. C. C., 314-315; *American Wholesale Lumber Assn.* v. *Director General*, 66 I. C. C. 393). Since the existing demurrage and storage charges were partly compensatory and partly punitive, it inevitably follows that those charges exhausted the entire compensatory element and still left a part of them as punishment. The purpose of the $10.00 a day charges is declared in the title to the tariff—we find the title, "Penalties for Detention of Equipment," repeated in the body of the tariff, where it is also declared that these

charges will be in addition to existing demurrage and storage charges. It is also in addition to the $7.00 reconsignment charge which is compensation for the privilege and service of reconsignment. The $10.00 a day charge was a penalty in its entirety. If it had been intended as compensation for the car while it was detained for reconsignment, it would have been applied to all cars detained for that purpose and not confined to cars loaded with lumber. The intention was to punish lumber shippers who detained cars for reconsignment.

The distinction between this charge and demurrage charges is the same as the distinction recognized by this court between taxes for revenue and taxes for regulation and punishment. The primary motive of the established demurrage charges is compensation for the use of cars and the motive of discouraging the detention of cars is incidental. The motive of the penalty here under consideration is punishment. Since, as we have shown, the compensatory factor was completely absorbed by the demurrage charges, there is no compensatory feature in this penalty charge. This case falls directly within the decision of this court in the Child Labor Tax case, 259 U. S., 20. This court there said, l. c., 38:

> "Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."

Neither the defendant carrier nor the Interstate Commerce Commission had the right to inflict a punishment for the act of detaining this car. The question presented is not whether the charge is excessive or unreasonable but whether it was prescribed and exacted under any lawful authority. This is a law issue which can be determined only by a court, a question which we will consider more fully in another place.

It seems so apparent that this charge is a penalty inflicted as a punishment that we deem it unnecessary to cite more than a case or two on this point. The tariff describes this charge as a penalty for detention of equipment. It states that it "will be in addition to any existing demurrage and storage charges", which consumed all of the compensatory element for detaining the car and left a margin of iicidental penalty. It was in addition to the compensatory charge for the privilege and service of reconsignment.

In *Hill* v. *Wallace*, 259 U. S., 44, l. c., 66-67, this court said:

> "When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power."

In *Tayloe* v. *Sandiford*, 20 U. S., 13, 7 Wheaton, 13, this court said:

> "Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to author-

> ize the court to say that their own words do not express their own intention. These writings appear to have been drawn on great deliberation; and no slight conjecture would justify the court in saying the parties were mistaken in the import of the terms they have employed."

In *Helwig* v. *United States*, 188 U. S., 605, this court considered the nature of an additional sum imposed upon an importer of merchandise when the appraised value should exceed by more than 10% the value declared in the entry. You there said, l. c., 610, 611:

> "Without other reference than to the language of the statute itself, we should conclude that the sum imposed therein was a penalty. It is not imposed upon the importation of all goods, but only upon the importer in certain cases which are stated in the statute, and it is clear that the sum is not imposed for any purpose of revenue, but is in addition to the duties imposed upon the particular article imported, and in each individual case when the sum is imposed it is based upon the particular act of the importer. That particular act is his under-valuation of the goods imported, and it is without doubt a punishment upon the importer on account of it."

The penalty we are considering is not imposed upon the detention of all cars for whatever purpose detained, but only upon the detention of cars loaded with lumber and held for reconsignment orders.

In *United States* v. *Chouteau*, 102 U. S., 603, l. c., 611, this court said:

> "The term 'penalty' involves the idea of punishment, and its character is not changed by the

mode in which it is inflicted, whether by a civil action or a criminal prosecution."

In *Lipke* v. *Lederer*, 259 U. S., 557, this court considered the propriety of collection by distraint of a so-called tax levied under the Volstead Act. It was sought to justify the collection by Section 35 of that act which contains the following: "No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500.00 on retail dealers and $1,000.00 on manufacturers." This court said, l. c., 561:

> "When by its very nature the imposition is a penalty, it must be so regarded."

In *Thome* v. *Lynch*, 269 Fed., 995, the District Court for the District of Minnesota held that the so-called taxes under the Volstead Act are penalties and not taxes.

The carrier had no authority to inflict a penalty. The Interstate Commerce Commission had no authority to inflict a penalty. The tariff filed with the Interstate Commerce Commission authorizing carriers to inflict a penalty was illegal, and consequently void. In *Boston & Maine Railroad* v. *Piper*, 246 U. S., 439, this court, speaking of a stipulation in the uniform live stock contract by the carrier with the Interstate Commerce Commission

> "While this provision was in the bill of lading, the form of which was filed with the Railroad Com-

> pany's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body (*Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S., 639, 654); but not so of conditions and limitations which are, as is this one, illegal, and consequently void."

The power to define offenses and prescribe punishments is lodged in Congress and the idea that any individual or association of individuals may assess a money penalty against another for a violation or supposed violation of the former's regulations is repugnant to our theory of government.

In *United States* v. *11,150 Pounds of Butter*, 195 Fed., 657, l. c., 664, the United States Circuit Court of Appeals for the Eighth Circuit said:

> "The definition of offenses, the classification of offenders, and the prescription of the punishment they shall suffer, are legislative, and neither executive nor judicial functions. And forfeitures, fines, and penalties may not be prescribed, imposed or inflicted for violations of a regulation of an executive department without previous legislative prescription."

The Interstate Commerce Commission has no power to assess penalties. *Slater* v. *Northern Pacific Ry. Co.*, 2 I. C. C., 359.

In *Interstate Commerce Commission* v. *C. N. O. & T. P. Ry. Co.*, 167 U. S., 479, the court after considering the

powers of the Interstate Commerce Commission said, l. c., 501:

> "The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative."

In *United States* v. *Grimaud*, 220 U. S., 506, this court reviews the case of *United States* v. *Eaton*, 144 U. S., 677, and distinguishes between the authority to impose and enforce a penalty which is prescribed by Congress and the lack of power of any officer to impose or enforce any penalty which is not prescribed by Congress. The court, speaking of the Eaton case which involved the oleomargarine act, said l. c., 519:

> "The court construed the act as a whole and proceeded on the theory that while a violation of the regulations might have been punished as an offense if Congress had so enacted, it had, in fact, made no such provision so far as concerned the particular charge then under consideration. Congress required the dealer to keep books rendering return of materials and products, but imposed no penalty for failing so to do. The Commissioner went much further and required the dealer to keep books showing oleomargarine received, from whom received and to whom the same was sold. It was sought to punish the defendant for failing to keep the books required by the regulations. Manifestly this was putting the regulations above the statute. The court showed that when Congress enacted that a certain sort of book should be kept, the Commissioner could not go further and require additional books; or, if he did make such regulation, there was no provision in the statute by which a failure to comply therewith could be punished."

The Interstate Commerce Act prescribes penalties and punishments for violation of certain of its provisions but nowhere does it prescribe a penalty for the detention of cars. Furthermore, where that act does prescribe penalties and punishments for violation of its provisions, it does not undertake to empower the Interstate Commerce Commission itself to inflict the punishment.

Congress has not undertaken to delegate to the carrier or to the Interstate Commerce Commission its legislative power of prescribing a penalty. Congress could not delegate that power.

In *Field* v. *Clark*, 143 U. S., 649, l. c. 692, this court said:

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S., 149, l. c. 164, you said:

> "Congress cannot transfer its legislative power to the States—by nature this is non-delegable."

This case presents not only the pecuniary and legal rights of the plaintiff in error, it also presents a vital principle. It is a matter of vital importance to shippers and the public at large that the carrier and the Interstate Commerce Commission be kept within constitutional bounds. In this instance they have reached out beyond the mere regulation of interstate transportation, which has been entrusted to the Commission, to the regulation of the conduct of a particular kind of business, which has

not been entrusted to the Commission. If by a system of fines and penalties either the carrier or the Commission may regulate the manner of conducting the lumber business, it may reach out into a general regulation of business under the guise of regulating transportation. The principle involved here is of great public importance.

II.

The court erred in not holding and deciding that the exaction and collection of the penalty charge of $10.00 a day in the manner and under the circumstances shown by the stipulated facts of this case denied plaintiff the equal protection of the laws and deprived plaintiff of its property without due process of law, all in violation of the fifth amendment to the Constitution of the United States.

From the agreed facts it appears that defendant in error, under the pretended authority of the tariff schedule, singled out shippers of lumber and punished them for detaining cars which were held for reconsignment, while it relieved from such punishment other shippers who detained the same cars when they were held for other purposes and even when they were held for reconsignment, if they were loaded with a commodity other than lumber. We respectfully submit this deprived the plaintiff in error of the equal protection of the laws and took its property without due process of law.

The classification is without sound basis. No special style, design or kind of car was used for lumber, it was shipped in cars in general use for the shipment of a variety of commodities. The same car would be used

now for one commodity, again for some other commodity, and at times for lumber. This is a stipulated fact (Par. Third, R., 11, Par. Tenth, R., 12). The penalty was not, therefore, based upon any classification of the kind of car detained. If a shipper detained a car at point of origin he was not subject to the penalty, no matter what the load was—lumber or other commodity. If a shipper or consignee detained a car at its final destination he was not subject to the penalty, no matter what the load was. If a shipper or consignee detained a car at the first destination and then rebilled it—took out a new bill of lading to a new destination—he was not subject to the penalty, no matter what the load was. If a shipper or consignee detained a car at the first destination and then reconsigned it, he was not subject to the penalty if the car was loaded with a commodity other than lumber—but under the same circumstances and conditions he was subject to the penalty if the car was loaded with lumber. These are conceded facts (Par. Tenth, R., 12). The car was as effectively removed from transportation service in one case as in another; clearly, the detention of a car from transportation service is not the basis of classification, nor is it compensation for the use of the car or compensation for the loss of the car from transportation service. What, then, is the basis? Obviously it is whether the shipper is engaged in the lumber business or in some other business. From the agreed facts (R., 10-13) it is apparent that the classification is arbitrary in law and that the conceded facts call into operation the judicial power of the court.

The justification offered is that more lumber dealers detain shipments in transit for reconsignment than those engaged in other business who use the same cars in

shipping their commodities. Granting for the argument only that they did, that would not justify an arbitrary classification. The privilege and service of reconsignment was given to shippers for a charge of $7.00. Lumber dealers had as much right to reconsign and as much right to detain cars for reconsignment as had anybody else. Jumping the first barrier that neither the carrier nor the Commission was authorized to impose a penalty, what substantial reason was there why the penalty should not apply to all shippers who detained cars, or at least all who detained cars for reconsignment? Any answer that implies that the carrier or the Interstate Commerce Commission may control business practices by imposing greater or lesser burdens on transportation is wrong. It was entirely beyond the power of either the carrier or the Interstate Commerce Commission to regulate the lumber business. If the purpose was to reduce the volume of business of those dealers who reconsigned shipments or increase the volume of business of those who did not, that purpose was unlawful.

Linder v. *United States*, 268 U. S., 5;
Child Labor Tax Case, 259 U. S., 20;
Hill v. *Wallace*, 259 U. S., 44;
Trusler v. *Crooks, Collector*, 7 Sup. Ct. Adv. Op., 198, decided by this court January 11, 1926.

Due process and equal protection have come to be interchangeable terms and any denial of equal protection is construed to deny due process. Whatever denies one the equal protection of the laws takes his life, his liberty or his property without due process of law. Decisions of

this and other courts, therefore, treating of equal protection under the fourteenth amendment, are fully applicable here in the consideration of the plaintiff's rights under the fifth amendment to the Constitution of the United States.

In *Gulf, Colorado and Santa Fe Railway* v. *Ellis*, 165 U. S., 150, l. c. 160, this court said:

> "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

And in *Truax* v. *Corrigan*, 257 U. S., 312, l. c. 332, you said:

> "Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. 'All men are equal before the law'. 'This is a government of laws and not of men', 'No man is above the law', are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws."

Again in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 79, l. c. 84, you said:

> "It has been wisely and aptly said that this is a government of laws and not of men; that there is no arbitrary power located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them."

While these statements were made in applying the fourteenth amendment the principles announced are equally guaranteed by the fifth amendment. The federal government has no more authority to violate these rights than have the state governments. Congress itself has not the power to violate them and it certainly cannot grant such authority to a carrier or to the Interstate Commerce Commission. We repeat, therefore, that those cases in which classifications and distinctions have been made in the consideration of laws of states are authoritative in this consideration.

The learned trial judge justified the infliction of the penalty under the facts disclosed by the agreed facts upon the ground that the case involved simply the question of classification and that this classification is not a mere arbitrary selection. He said:

> "There is no competition between lumber dealers and dealers in other commodities. The retention of cars upon consignments used for other commodities was found to be comparatively negligible. Shippers of lumber who do not reconsign cars are, of course, not subject to this charge; if they do practice reconsignment, then they are subject to the same penalties" (R., 22).

The competition between lumber shippers and shippers of steel and shippers of cement may be so indirect that it cannot be accurately measured. But the three are to a degree interchangeable as building materials and one who contemplated building would have been influenced in choosing material by superior advantages in transportation. Again there was a competition between shippers of lumber and dealers in dry goods and all other

commodities in obtaining cars in which to make their shipments. The shipper who could get cars and use them in reconsignment without paying a penalty had an advantage over the shipper who would be punished for using the same car for the same length of time. The fact, if it be a fact, that at that particular time more lumber shippers were reconsigning cars than were shippers of other commodities is no justification. One might as well say that because it is generally supposed that more negroes than white people steal chickens, negroes should be punished for that offense and white people should go free. Detaining cars for reconsignment or for any other purpose is either punishable or it is not punishable; if the former, all offenders should be equally subject to punishment, if the latter, nobody should be subject to punishment. It would be no justification in the illustration just used to say that a law imposing punishment on negroes for stealing chickens applies to all negroes, that is to say, applies to all of a class alike.

A car is as effectually removed from transit when it is loaded with steel or cement as when it is loaded with lumber, when it is held for other purposes as when it is held for reconsignment, when it is held at final destination as when it is held at first destination. The shipper of dry goods commits as great an offense against the public and against other shippers when he detains a car for reconsignment at the first destination as does a shipper of lumber. No particular style, design or kind of car was used for lumber, it was shipped in the same car that was used at other times for the shipment of other commodities; the punishment was not inflicted for detaining a particular kind of car but for detaining it in plaintiff's particular kind of business.

We respectfully submit that if the authority of the Interstate Commerce Commission or of the carrier to single out a specific line of business for punishment and exempt other kinds be recognized, the principle of equal protection of the laws will be nullified.

The singling out of a particular kind of business for regulation and punishment has never been upheld by this court except where the nature of the business itself is so perilous as to require police regulation. This court has refused to recognize a commodity in which one deals as a basis for classification.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, an anti-trust statute of Illinois was set up as a defense. The court said, l. c. 556:

> "The vital question, however, is whether the statute of Illinois of 1893 is not inconsistent with the Constitution of the United States, by reason of the fact that by the ninth section it declares that 'the provisions of this act shall not apply to agricultural products or live stock while in the hands of producer or raiser.' The Circuit Court held this section to be repugnant to the Fourteenth Amendment of the Constitution of the United States, and to be so connected and interwoven with other sections that its invalidity affected the entire act."

After a discussion of due process and equal protection, the court said, l. c. 560:

> "These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes

named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe."

In *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S., 150, this court, answering the argument that if the law deals alike with all in a certain class it is not obnoxious to the charge of a denial of equal protection, said:

"The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

In *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S., 150, this court cited with approval *State* v. *Loomis*, 115 Mo., 307, where the Supreme Court of Missouri de-

clared unconstitutional a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue script in payment of wages, and, after citing authorities, proceeded further, l. c. 157:

> "But if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. * * * But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the State, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the State and with a view to enforce just and reasonable police regulations.
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> * * *
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> Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the State, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency."

This court has held that the quantity of business is not a measure of classification. In *Cotting* v. *Kansas City*

Stock Yards Company, 183 U. S., 79, the court reviewed a statute of the State of Kansas which sought to impose a burden upon stock yards having an average daily receipt of not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep, which was not imposed upon other stock yards in the state. The statute was held unconstitutional on the ground that it took property without due process. On page 105 the court quoted the following from Judge Catron:

> "Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

The court fully discusses this question with illustrations and citations of authorities and concludes on page 112 as follows:

> "There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron re-

ferred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

In *Kentucky Finance Corporation* v. *Paramount Auto Exchange Corporation*, 262 U. S., 544, the court considered a statute under which a foreign corporation, not domesticated or doing business in the state, or having property there other than that sought to be recovered, was compelled, as a condition to the maintenance of its action, to send its officer, with its papers and books bearing on the matter in controversy, from its domicile to the state where the action was brought, in order to submit to an adversary examination before answer. The statute did not subject non-resident individuals to such examination, except when served with notice and subpoena within the state, and it limited such examinations, in the case of residents of the state, individual or corporate, to the county of their residence. The court said, l. c. 551:

"No doubt a corporation of one State seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S., 553, 561); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having

no reasonable support in that fact and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin,—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit."

III.

The court erred in not holding and deciding that the exaction and collection of the penalty in the manner shown by the stipulated facts of this case was without notice to plaintiff and without opportunity for hearing.

In this case plaintiff in error has been punished without an opportunity to be heard. The learned trial judge replies by saying: "The published tariff, without more, is due notice of the charge to all shippers who bring themselves within its terms." We respectfully submit that the publication of the tariffs had no more effect in giving notice than does the distribution of printed copies of a penal statute. The notice required is not that the act is an offense but that the person to whom the notice is given is charged with committing the offense. Defend-

ant had possession of plaintiff's property and it was necessary to pay the penalty charge as a condition of delivery, without opportunity of being heard. If it did not pay the penalty its goods would not be released and it would incur additional charges and penalties with every day's delay. Even though the accused be guilty or have no defense, yet he is entitled to notice and an opportunity for being heard. Punishment cannot be thus inflicted.

In *Baker* v. *Baker, Eccles & Co.*, 242 U. S., 394, this court said:

> "The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard."

In *Windsor* v. *McVeigh*, 93 U. S., 274, l. c. 277, this court said:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations."

IV.

Measured by the act to regulate commerce applied to the stipulated facts, the prescription and the infliction of the penalty were unlawful.

Neither in the act to regulate commerce nor elsewhere has Congress declared the detention of cars an offense or prescribed a punishment for it. It could not,

and has not undertaken to, delegate such authority to the Interstate Commerce Commission. The Commission has no legislative powers. In *Streever Lbr. Co.* v. *C. M. & St. P. Ry. Co.*, 34 I. C. C., 1, the Commission itself said that it "possesses only such powers as were conferred upon it by the act to regulate commerce." In *Jones et al.* v. *St. L. & S. F. R. R. Co.*, 12 I. C. C., 144, l. c. 148, the Commission said: "Our jurisdiction as an administrative and quasi-judicial body rests wholly upon the provisions of the act to regulate commerce." In *Pittsburgh & W. Va. Ry. Co.* v. *P. & L. E. R. R. Co.*, 61 I. C. C., 272, l. c. 276, the Commission said: "It is fundamental that we can only act under the jurisdiction conferred upon us by the Congress. We must exercise powers which we have subject to any limitations which now attach to them."

In *United States* v. 11,150 *Pounds of Butter*, 195 Federal, 657, the United States Circuit Court of Appeals for the Eighth Circuit said:

> "The definition of offenses, the classification of offenders, and the prescription of the punishment they shall suffer are legislative, and neither executive nor judicial functions. And forfeitures, fines, and penalties may not be prescribed, imposed or inflicted for violations of a regulation of an executive department without previous legislative prescription."

In *Keane* v. *United States*, 272 Fed., 577, the United States Circuit Court of Appeals for the Fourth Circuit, said:

> "If a head of a department has the power to make rules which subject classes of property to forfeiture and classes of persons to penalties, that

> power must be expressly given him by Congress, and well defined, so as to make his rule or regulation an act of the supreme law making body."

This court has applied this principle in a number of cases. In *United States* v. *Eaton*, 144 U. S., 677, l. c. 688, you said:

> "It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in paragraph 41 of the Act of October 1, 1890."

The act to regulate commerce does not undertake to give to a carrier or to the Interstate Commerce Commission authority to inflict a penalty on shippers of lumber or on anybody else. On the contrary, it specifically prescribes the offenses that may be punished and in each and every instance provides that the enforcement shall be by a separate action instituted in a court of competent jurisdiction. Refusal or neglect to comply with an order of the Commission requiring carriers to provide themselves with safe and adequate facilities for performing certain duties is punishable by a penalty of $100.00 per day, which accrues to the United States and may be recovered in a civil action (Par. (21) of Sec. 1). Knowingly and wilfully failing to comply with certain orders makes an

officer or agent of the carrier guilty of a misdemeanor and subject to fine upon conviction (Par. (24), Sec. 1). Failure or refusal of a carrier to comply with the terms of any regulation adopted or promulgated or any order made by the Commission subjects the offender to a specified penalty which shall accrue to the United States and may be recovered in a civil action (Par. (10), Sec. 6). Failure or refusal of an agent to give a written statement of applicable rates is punishable by a penalty which may be recovered in a civil action (Par. (11), Sec. 6). Any carrier, director, officer, agent or employe who shall wilfully do anything in the act prohibited or declared to be unlawful shall be deemed guilty of a misdemeanor (Par. (1), Sec. 10). False billing, false weighing, etc., is declared to be a misdemeanor (Par. (2), Sec. 10 and Par. (4), Sec. 10).

Similar provisions are found in par. (12), of Sec. 15, par. (8) of Sec. 16, par. (K) of Sec. 19-a, par. (2), (6) and (7) of Sec. 20, par. (11) of Sec. 20-a, par. (12) of Sec. 20-a, par. (2) and (3) of Sec. 22 and in Sec. 26. In every instance the amount of the penalty is prescribed and in each instance the court in which the penalty shall be recovered is designated. In no case is the Commission authorized to impose or inflict a penalty.

The learned trial judge in his opinion (R., 22), said:

> "No discrimination appears upon the face of this tariff. Only shippers of the same class, engaged in the same business, *and who do business in the same way*, are affected and all such are affected alike."

The italics are ours and the italicized words express the gravamen of our point concerning the classification.

If under the guise of regulating transportation the carrier or the Interstate Commerce Commission undertakes to regulate *the way of doing* a particular kind of business, it exceeds the authority given to either under the statute and the power of either under the Constitution. We have here precisely the principle declared in *Child Labor Tax Case*, 259 U. S., 20, *Hill* v. *Wallace*, 259 U. S., 44, and *Trusler* v. *Crooks, Collector*, No. 7 Sup. Ct. Adv. Op., 198.

If Congress had undertaken to give a carrier or the Interstate Commerce Commission authority to define offenses and prescribe punishments, the classification attempted here would fail because it is arbitrary. Even if the Commission should rule that there was sufficient difference in service to justify the imposition of a penalty for detaining cars used in doing a lumber business in one way and not for the detention of the same cars used in doing the same business in another way, such finding would be based upon shadow and not on substance and would fall within the declaration of this court in *Interstate Commerce Commission* v. *Illinois Central Railroad*, 215 U. S., 452, l. c. 470, that "even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

The Interstate Commerce Act expressly denies to any carrier the powers attempted to be exercised by the tariff under consideration here. Section 3 of the act to

regulate commerce, as amended February 28, 1920, contains this provision:

> "Sec. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This penalty is not within the rate regulating discretion of the Commission.

The Interstate Commerce Commission could not give to defendant what the statute has taken away. If it had specifically found the facts stipulated herein and had expressly declared that the classification was lawful, it would not be allowed to stand because the facts would not support the finding. The stipulated facts, therefore, present an issue of law under the act to regulate commerce which must be determined by a court and cannot be determined by the Commission itself. As this court said in *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, l. c., 197: "The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact."

In *Northern Pacific Railway Company et al.* v. *Department of Public Works of Washington et al.*, 13 United

States Supreme Court Advance Opinions, 1924-1925, 485, l. c., 487, you said:

> "An order based upon a finding made without evidence (Chicago Junction Case (*Baltimore & O. R. Co.* v. *United States*) 264 U. S., 258, 263, 68 L. Ed. 667, 673, 44 Sup. Ct. Rep. 317), or upon a finding made upon evidence which clearly does not support it (*Interstate Commerce Commission* v. *Union P. R. Co.*, 222 U. S., 541, 547, 56 L. ed. 308, 311, 32 Sup Ct. Rep. 108), is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process. Compare *New York ex rel. New York & Q. Gas Co.* v. *McCall*, 245 U. S., 345, 348, 62 L. Ed. 337, 340, P. U. R. 1918A, 792, 38 Sup. Ct. Rep. 122."

In Los Angeles Switching Case, 234 U. S., 294, l. c., 313, this court considered and determined the question as to whether the finding of the Commission was opposed to the admitted physical facts. The consideration of that question assumes that the court would have had jurisdiction to set aside a finding of the Commission as being opposed to the admitted physical facts, thus declaring in effect that the court may draw its own conclusions as to the legal effect of the facts.

In *Interstate Commerce Commission* v. *Ill. Cent. R. R.*, 215 U. S., 452, l. c., 470, this court said:

> "Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, (a), all relevant questions of constitutional power or right; (b), all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c)

a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

In *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S., 184, l. c., 197, this court said:

"In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class."

In *Interstate Commerce Commission* v. *L. & N. R. R.*, 227 U. S., 88, l. c., 91, this court said:

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi* judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the

finding was contrary to the 'indisputable character of the evidence.' *Tang Tun* v. *Edsell*, 223 U. S., 673, 681; *Chin Yoh* v. *United States*, 208 U. S., 8, 13; *Low Wah Suey* v. *Backus*, 225 U. S., 460, 468; *Zakonaite* v. *Wolf*, 226 U. S., 272; or, if the facts found do not, as a matter of law, support the order made. *United States* v. *B. & O. S. W. R. R.*, 226 U. S., 14. Cf. *Atlantic C. L.* v. *North Carolina Corp. Com.*, 206 U. S., 1, 20; *Wisconsin, M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287, 301; *Oregon Railroad* v. *Fairchild*, 224 U. S., 510; *I. C. C.* v. *Illinois Central*, 215 U. S. 452, 470; *Southern Pacific Co.* v. *Interstate Com. Comm.*, 219 U. S., 433; *Muser* v. *Magone*, 155 U. S., 240, 247."

In *Great Northern Railway* v. *Merchants Elevator Co.*, 259 U. S., 285, l. c., 290, this court said:

"It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission."

On page 291 this court said further:

"But what construction shall be given to a railroad tariff presents ordinarily a question of law

which does not differ in character from those presented when the construction of any other document is in dispute.

When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law."

A tariff provision gains nothing in legality by being filed with the Interstate Commerce Commission. Lodging it there gives it no sanctity that will save it from inspection by the courts. If a tariff contain illegal provisions the court may declare them illegal without regard to how and where they originated.

In *Boston & Maine Railroad* v. *Piper*, 246 U. S., 439, speaking of a stipulation in a uniform live stock contract filed by the carrier with the Commission which limited the carrier's liability for unusual delay and detention caused by its own negligence to the amount actually expended by the shipper in the purchase of food and water this court said, l. c., 445:

> "While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The legal conditions and limitations in the carrier's bill of lading duly filed with the commission are binding until changed by that body (*Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S., 639, 654); but not so of conditions and limitations which are, as is this one, illegal, and consequently void."

The tariff in question in the instant case denied lumber dealers equal treatment with dealers in other com-

modities, it denied lumber dealers who reconsigned shipments equal treatment with those who did not. It violated the letter and the spirit of the law, it violated the declaration of this court in *N. Y. N. H. & H. R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361, where you said:

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism. * * * If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

CONCLUSION.

Neither the carrier nor the Interstate Commerce Commission had authority to prescribe or inflict a penalty by tariff or in other manner. The penalty was inflicted without notice. The punishment prescribed by the tariff was not based upon any classification of the kind of car detained, lumber being shipped in any kind of car available. It was not based upon the length of time the car was detained; a shipper might detain a car at point of origin or at the final destination for the same length of time without penalty, a shipper of any other commodity might detain the same kind of car for reconsignment at the same place for the same period of time without penalty. Only a shipper of lumber was subject to the penalty. Obviously the shipper's business is the basis of clas-

sification. From the agreed facts it is apparent that this is an arbitrary classification as a matter of law. If the purpose of the charge be actually to discourage the detention of cars it is unjustifiable under any theory unless it be uniformly applied under established demurrage principles. Obviously it would be a discrimination under any theory to apply the penalty to reconsignments of lumber and not to the reconsignment of other commodities. If the purpose was actually to reduce the volume of business of those dealers in lumber who reconsign cars, it was entirely beyond the scope of the Interstate Commerce Commission. The penalty as provided in the tariff and applied in practice could not be legalized by any proof, and the Commission could not by any order make it valid. The stipulated facts of the case do not support the judgment.

We respectfully submit that the court erred in rendering and entering its judgment and decree in favor of the defendant and against the plaintiff for the reasons we have stated, and that the judgment of the District Court for the Western District of Missouri should be reversed.

REES TURPIN,
EDWARD A. HAID,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 271

TURNER, DENNIS & LOWRY LUMBER COMPANY,
Plaintiff in Error,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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J. N. DAVIS,
Counsel for Defendant in Error.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

CASES CITED.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

We believe that in order to afford the court a clear and complete understanding of the questions raised in this case, a short statement of material facts should be made.

This action was begun by plaintiff in error in the District Court for the Western District of Missouri, Western Division, in September, 1923, under authority of Section 9 of the Interstate Commerce Act (24 Stat. L. 379) to recover from defendant in error a tariff charge of $40 made for the detention of an interstate car of lumber held at Aberdeen, South Dakota, for reconsignment by plaintiff in error, in December, 1921. The charge of $40 was made in accordance with the lawfully

published tariff on file with the Interstate Commerce Commission, which is known and referred to as "National Car Demurrage Rules and Charges." The tariff provided (Rec., 12):

> "On cars loaded with lumber held for reconsignment a storage charge of $10 per car will be assessed for each day or fractional part of a day that a car is held for reconsignment after 48 hours after the hour at which free time begins to run under the demurrage rules.
>
> These charges will be assessed regardless of whether cars are held on railroad hold tracks or transfer tracks, including consignees or other private sidings, and will be in addition to any existing demurrage and storage charges."

As a caption in the tariff preceding the above rule, the following appeared:

> "To prevent undue detention of equipment under present emergency, the following additional penalties for detention of equipment will apply:"

This tariff regulation providing for the $10 additional storage charge per car, per day, on cars loaded with lumber and held for reconsignment, had been filed with the Interstate Commerce Commission and although protested by shippers, the Commission permitted the tariff to become operative. (Rec., 13.) Plaintiff in error paid the $40, together with other charges, such as line-haul, demurrage, and reconsignment charges, and now brings this suit to recover the $40 storage charge of $10 per car per day.

Plaintiff in error, in its petition filed in the District Court, claimed that defendant in error was without authority to exact and collect the storage charge of $40 because:

1. The charge was in the nature of a penalty and the prescription of a penalty is a legislative function which

could not be delegated either to the carrier or to the Interstate Commerce Commission; that the infliction thereof by defendant in error was a usurpation of legislative function.

2. The plaintiff in error was deprived of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, because the storage charge was made without notice and without an opportunity for a hearing of any kind.

3. The plaintiff in error was deprived of its property without due process of law and denied the equal protection of the law, all in violation of the Fifth Amendment, because the additional storage charge applied only on shipments of lumber held for reconsignment and did not apply on shipments of other commodities.

4. The imposition of the additional storage charge subjected plaintiff in error's traffic to an undue and unreasonable prejudice or disadvantage in violation of the Interstate Commerce Act.

The answer of defendant in error filed in the District Court set forth that the petition questioned the validity of tariff rates that were peculiarly within the province and jurisdiction of the Interstate Commerce Commission, and not within the jurisdiction of the court. (Rec., 5.) The trial court rendered its decision November 8, 1924, giving judgment for the defendant. (Rec., 6.) *Turner, Dennis & Lowry Lumber Co.* v. *C. M. & St. P. Ry. Co.* 2 Fed. (2d) 291.

The history of the storage charge and the facts justifying its establishment and maintenance as a tariff charge during the period the charge was in effect, are clearly set forth in the decision of the Interstate Commerce Commission in the case of *American Wholesale Lumber Assn.* v. *Director General, and Railroads,* 66

I. C. C. 393. Also, a statement of the purpose of the charge and its origin will be found in the opinion of this court in the case of *Edward Hines, etc., Trustees,* v. *U. S. et al.* 263 U. S. 143, 145, 146.

The trial court held that if the suit was to be regarded as an action for reparation, then the contention of defendant that the court was without jurisdiction should be sustained. (Rec., 18.) The court considered the constitutional questions raised, and decided against the contention of the plaintiff in error. (Rec., 19-22.)

PRINCIPAL ISSUES PRESENTED BY THIS RECORD.

1. Congress could not delegate its legislative power of prescribing a penalty to either the defendant in error or to the Interstate Commerce Commission.

2. The inflicting of a penalty on plaintiff in error, without notice and without opportunity for hearing of any kind, deprives plaintiff in error of its property without due process.

3. Applying the charge only on shipments of lumber held for reconsignment and not making it applicable to all kinds of shipments, denied plaintiff in error the equal protection of the law and deprived it of its property without due process.

4. Defendant in error subjected plaintiff in error and its particular traffic to an undue or unreasonable prejudice or disadvantage, in violation of the Interstate Commerce Act.

BRIEF OF AUTHORITIES.

I.

TARIFF CHARGES AND REGULATIONS, THOUGH REFERRED TO AS PENALTIES, ARE NOT PENAL STATUTES OR PENAL LAWS.

Huntington v. *Attrill,* 146 U. S. 657, 667.

C. B. & Q. R. R. v. *United States,* 220 U. S. 559, 577.

Hepner v. *United States,* 213 U. S. 103, 108.

Oceanic Navigation Co. v. *Stranahan,* 214 U. S. 320, 337, 338.

Hines v. *W. F. Richardson, Jr. Co.* (C. C. A.) 290 Fed. 162, 164.

Kilton et al. v. *Providence Tool Co. et al.* 48 Atl. 1039, 1041.

Aylsworth v. *Curtis,* 34 Atl. 1109, 1111.

Hutchinson v. *Young,* 80 N. Y. Supp. 259, 260.

American Credit Indemnity Co. v. *Ellis et al.* 59 N. E. 679, 681, 682.

II.

THE PUBLISHED TARIFF CONSTITUTES NOTICE TO SHIPPER.

L. & N. R. R. Co. v. *Maxwell,* 237 U. S. 94, 97.

Berwind-White Coal Mining Co. v. *Chi. & Erie R. R. Co.* 235 U. S. 371, 375.

A. J. Poor Grain Co. v. *C. B. & Q. R. R. et al.* 12 I. C. C. 469, 470.

III.

THE LAW AFFORDED PLAINTIFF IN ERROR AMPLE AND REASONABLE OPPORTUNITY FOR HEARING, HAD IT CHOSEN TO AVAIL ITSELF OF THE PROVISIONS OF THE INTERSTATE COMMERCE ACT.

Section 15, par. 7, Interstate Commerce Act (34 Stat. L. 584, 36 Stat. L. 539, 41 Stat. L. 484).

Section 13, par. 1, Interstate Commerce Act (24 Stat. L. 379, 36 Stat. L. 539, 41 Stat. L. 484).

IV.

VIOLATIONS OF THE INTERSTATE COMMERCE ACT, INVOLVING ADMINISTRATIVE QUESTIONS MUST BE DETERMINED IN THE FIRST INSTANCE BY THE INTERSTATE COMMERCE COMMISSION.

Texas & Pacific Ry. v. *Abilene Cotton Oil Co.* 204 U. S. 426, 438.

Robinson v. *B. & O. R. R.* 222 U. S. 506.

Morrisdale Coal Co. v. *Penn. R. R.* 230 U. S. 304.

Kansas City So. Ry. v. *Albers Comm. Co.* 223 U. S. 573.

B. & O. R. R. v. *United States ex rel. Pitcairn Coal Co.* 215 U. S. 481.

Texas & Pacific Ry. v. *American Tie & Timber Co.* 234 U. S. 138.

Loomis v. *Lehigh Valley Ry. Co.* 240 U. S. 43.

Great Northern Ry. v. *Merchants Elevator Co.* 259 U. S. 285, 291.

Texas & Pacific Ry. Co. v. *I. C. C.* 162 U. S. 197, 219.

Chicago B. & Q. Ry. v. *Merriam & Millard Co.* 297 Fed. 1.

V.

"TRANSPORTATION" INCLUDES STORAGE, DEMURRAGE AND TERMINAL CHARGES AND THE LAW REQUIRES THAT TARIFFS CONTAINING SUCH CHARGES BE FILED WITH THE INTERSTATE COMMERCE COMMISSION.

Section 1, Interstate Commerce Act, 41 Stat. L. 474.

Section 6, Interstate Commerce Act, 41 Stat. L. 483.

Southern Ry. Co. v. *Prescott,* 240 U. S. 632, 638.

Berwind-White Coal Mining Co. v. *Chi. & Erie R. R.* 235 U. S. 371.

Lehigh Valley Ry. Co. v. *United States* (C. C. A.) 188 Fed. 879, 885.

United States v. *Standard Oil Co.* (D. C.) 148 Fed. 719, 722.

Swift & Co. v. *Hocking Valley R. R.* 243 U. S. 281, 283.

Penn. R. R. Co. v. *Kittanning Iron & Steel Mfg. Co.* 253 U. S. 319.

VI.

THE TRANSPORTATION ACT 1920 INTRODUCED INTO FEDERAL LEGISLATION A NEW RAILROAD POLICY, WHICH POLICY WAS TO INSURE ADEQUATE TRANSPORTATION SERVICE.

Akron, Canton & Youngstown Ry. Co. et al. v. *United States,* 261 U. S. 184.

Railroad Commission v. *Chicago, B. & Q. R. R.* 257 U. S. 563, 585.

Dayton-Goose Creek Ry. Co. v. *United States,* 263 U. S. 456, 477.

Texas & Pacific Ry. Co. v. *Gulf, Colorado & Santa Fe Ry. Co.* decided March 1, 1926, not yet reported.

Section 1, par. 15, Interstate Commerce Act (41 Stat. L. 476).

VII.

THE TRANSPORTATION ACT 1920 AMENDED SECTION 1 OF THE INTERSTATE COMMERCE ACT, DEFINED "CAR SERVICE," AND MADE IT THE DUTY OF THE INTERSTATE COMMERCE COMMISSION TO DETERMINE WHETHER OR NOT THERE EXISTS A CAR SHORTAGE, OR OTHER EMERGENCY, AND AUTHORIZED THE COMMISSION TO ESTABLISH RULES THAT WILL BEST PROMOTE THE SERVICE IN THE INTEREST OF THE PUBLIC AND THE COMMERCE OF THE PEOPLE.

Section 1, par. 15, Interstate Commerce Act (41 Stat. 456, 474, 476).

Avent v. *United States*, 266 U. S. 127, 130.

ARGUMENT.

I.

TARIFF CHARGES AND REGULATIONS, THOUGH REFERRED TO AS PENALTIES, ARE NOT PENAL STATUTES OR PENAL LAWS.

The plaintiff in error proceeded before the trial court, and has predicated its brief in this court, on the theory that the storage charge of $10 per car per day is a penal provision, and reasons that since the courts have held that a published tariff, so long as it is in force, has the effect of a statute and is binding alike on carriers and shippers, therefore the tariff provision here considered is a penal statute which neither the carrier nor the Interstate Commerce Commission had the power to make. Plaintiff in error further reasons that all penal statutes must be passed by Congress, and contends that since the Interstate Commerce Commission is not and cannot be vested, under the Constitution, with legislative power, therefore the tariff provision here in question, considered by it as a penal statute, is contrary to the Constitution of the United States. The fallacy of such reasoning is apparent. The tariff provision in question providing for an additional storage charge of $10 per car per day for the detention of cars loaded with lumber and held for reconsignment, is not a penal statute in the sense that plaintiff in error is contending. Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against a wrongdoer are some-

times spoken of as penal in their nature but in such cases neither the liability imposed nor the remedy given is strictly penal.

Huntington v. *Attrill,* 146 U. S. 657, 667.
Kilton et al. v. *Providence Tool Co. et al.* 48 Atl. 1039, 1041.
Aylsworth v. *Curtis,* 34 Atl. 1109, 1111.
American Credit Indemnity Co. v. *Ellis,* 59 N. E. 679, 682.
Hutchinson v. *Young,* 80 N. Y. Supp. 259, 260.
C. B. & Q. R. R. v. *United States,* 220 U. S. 559, 577.

From the facts in this case, it is seen that the railroad company, by its filed tariff, has made a charge in the nature of a storage or demurrage charge, but this can in no sense be regarded as a penal law imposing punishment for an offense and therefore coming within the purview of the constitutional guaranty. The tariff provision here brought into controversy is not a penal statute or a penal law, or a penalty as defined by criminal laws. It is a storage charge assessed for the detention of cars of lumber held for reconsignment during an emergency period caused by a car shortage.

In the case of *Hines, Director General of Railroads,* v. *W. F. Richardson, Jr. Co.* 290 Fed. 162, the Circuit Court of Appeals, Fourth Circuit, had before it a case in which the Director General sought to collect demurrage charges from the debtor. The debtor defended on the ground that the suit was strictly for the recovery of penalties and therefore, under the Virginia Penal Code, was barred by the limitation of one year. The Circuit Court of Appeals pointed out that Section 1 of the Interstate Commerce Act provides that "transportation" shall include "all service in connection with the receipt, deliv-

ery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." The court further noted that by Section 6 of the Interstate Commerce Act, the railroad is required to file schedules which shall state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require. Further, that it had been held by the Supreme Court of the United States that such charges were on the same basis as freight charges and were therefore a part of the contract for transportation, citing *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632; *Davis* v. *Timmonsville Oil Co.* 285 Fed. 470. At page 164, the court said:

> "It is true that the Interstate Commerce Commission and the Supreme Court itself have referred to demurrage charges as partaking of the nature of a penalty for undue detention of cars. *Pennsylvania R. Co.* v. *Kittanning Co.* 253 U. S. 319, 323, * * *; *Kehoe & Co.* v. *Charleston, etc. R. Co.* 11 Interst, Com. Com'n R. 166, 170. The true view seems to be that stated by the Interstate Commerce Commission, in Investigation & Suspension Dockets 83 and 83-a, 25 Interst. Com. Com'n R. 314, 315, that the demurrage charge is intended 'to be in part compensation to the carrier and in part a penalty to secure the release of equipment and tracks.' * * *
>
> But it makes no difference what the demurrage charge may be called, or that it partakes both of the nature of a charge for service and a penalty to stimulate promptness on the part of shippers and consignees. It was approved by the Interstate Commerce Commission and incorporated in the bills of lading along with the freight as a part of the transportation charges. When the defendants accepted the cars, they impliedly contracted to pay all these transportation charges. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink*, 250 U. S. 577 * * *; *N. Y. Central* v. *Whitney Co.* 256 U. S. 406 * * *."

The court held that the Director General was entitled

to recover and that the penal statute of limitation of one year was not applicable. (Writ of Error dismissed for want of jurisdiction, 264 U. S. 573, 574.)

It will be observed that the above case was decided even before the broader powers of the Transportation Act 1920 were in effect.

II.

THE PUBLISHED TARIFF CONSTITUTES NOTICE TO SHIPPER.

Plaintiff in error, relying upon the false premise that the tariff providing the charge in question is equivalent to a penal statute, contends that it is entitled to notice and a hearing, and that being deprived of notice and a hearing, it has been deprived of its property without due process of law, in violation of the Fifth Amendment to the Constitution. Again the error of such a contention is obvious. The tariff provision is not a penal law in the sense that plaintiff in error is contending; it does not impose punishment for an offense committed against the state, nor is it an offense that can be pardoned by the chief executive of the land. It is merely a tariff regulation published by the carriers and approved by the Interstate Commerce Commission, for the purpose of aiding and promoting interstate commerce. Under such tariff provision, the shipper and the traveler are charged with notice by the filing of the tariff with the Interstate Commerce Commission, and they, as well as the carriers, must abide by it unless it is found by the Interstate Commerce Commission to be unreasonable or otherwise unlawful.

L. & N. R. R. v. *Maxwell*, 237 U. S. 94, 97.

Berwind-White Coal Mining Co. v. *Chicago & Erie R. R.* 235 U. S. 371, 375.

A. J. Poor Grain Co. v. *C. B. & Q. R. R. et al.* 12 I. C. C. 469, 470.

III.

PLAINTIFF IN ERROR WAS NOT DENIED THE OPPORTUNITY FOR A HEARING.

The plaintiff in error was not denied a hearing, nor was it denied an opportunity to be heard. Under paragraph 7 of Section 15 of the Interstate Commerce Act (34 Stat. L. 584, 36 Stat. L. 539) the Interstate Commerce Commission is given authority, upon protest of the shipper or upon its own initiative, to suspend any scheduled provision. The statement of facts in this case (Rec., 13) shows that the schedule here in question was protested, but the Interstate Commerce Commission permitted it to go into effect. Further, under Section 13 of the Interstate Commerce Act, paragraph 1 (24 Stat. L. 379), any person, firm, corporation, etc., may file a complaint with the Interstate Commerce Commission, complaining of anything done or omitted to be done by any common carrier subject to the provisions of the act. Such complaint or petition shall briefly state the facts, whereupon the Commission shall call upon the common carrier to satisfy the complaint or answer it. If the carrier shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating said complaint, it is the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

With reference to the tariff provison here involved, a complaint was filed with the Interstate Commerce Commission by a great number of shippers and receivers of freight, and a decision was rendered in February, 1922, in which the Commission considered all the questions

raised in this case, and others, and after a full hearing, found:

> "We find that conditions existing at the time warranted the establishment of the penalty charge and that it was not unreasonable or otherwise unlawful. There is now a large surplus of serviceable empty cars, and generally speaking no congestion in the country. In the past car shortages at times have followed quickly upon periods of car surplus. It is impossible to forecast the continuance of present conditions, or what will be the conditions when the normal stride in business is reached. We are of the view that there is no justification for the charge at the present time and we find that while present conditions continue it is and will be unreasonable.
>
> * * * * *
>
> It should be clearly understood that our approval of the elimination of the charge at this time is based solely on existing conditions, and is not to be construed as an inhibition on the carriers to publish penalty charges in the future if and when conditions warrant."
>
> *American Wholesale Lumber Asso.* v. *Director General as Agent, Aberdeen & Rockfish R. R. Co. et al.* 66 I. C. C. 393, 407, 408.

In the case of *Sullivan Lumber Co.* v. *Director General as Agent*, 78 I. C. C. 393, in considering the tariff provision with reference to the storage charge involved in the instant case, and in rendering its decision, the Commission said, at page 395:

> "We find that the charges assailed were not unreasonable or otherwise unlawful. The complaint will be dismissed."

In the case of *Stetson, Cutler & Co.* v. *N. Y. N. H. & H. Ry.* 91 I. C. C. 3, the Commission had under consideration the tariff provision authorizing the storage charge of $10 per car per day applicable to cars loaded with lumber and held for reconsignment. The storage charge

was assessed on three carloads of lumber shipped in June, 1921. The complaint alleged "that the penalty charges assessed for detention of three cars of lumber * * * were unjust, unreasonable and without tariff authority." Reparation was asked. The Commission, in dismissing the complaint, found that the cars were reconsigned and that the application of the penalty charge was not illegal.

In the case of *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, this court held that the inquiry of the Interstate Commerce Commission as to the reasonableness of a tariff rate, was general in its nature and that "the finding thereon was general in its operation and inured to the benefit of every person that had been obliged to pay the unjust rates." By analogy the finding of the Interstate Commerce Commission with reference to the tariff provision here in question is binding upon plaintiff in error. The decision of the Interstate Commerce Commission was rendered February 11, 1922. The petition was filed in the Federal District Court September 13, 1923. (Rec., 2.) From the foregoing it hardly can be contended by plaintiff in error that the law provides it with no notice or opportunity to be heard. To contend and to insist that there has been a violation of the Fifth Amendment, based on the grounds of lack of notice or opportunity for hearing, is without merit; for such contention is void of substantial grounds and is lacking in substance, and so wanting in real merit as to be frivolous.

IV.

VIOLATIONS OF THE INTERSTATE COMMERCE ACT, INVOLVING ADMINISTRATIVE QUESTIONS MUST BE DETERMINED IN THE FIRST INSTANCE BY THE INTERSTATE COMMERCE COMMISSION.

The contention of plaintiff in error that it is denied the equal protection of the law because the charge only applies to shipments of lumber held for reconsignment and does not apply to all kinds of shipments, is only another way of saying that the charge is unjustly discriminatory in violation of the provisions of the Interstate Commerce Act—purely an administrative question and one that must be decided in the first instance by the Interstate Commerce Commission before the courts have jurisdiction.

Tex. & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438

Robinson v. *B. & O. R. R.*, 222 U. S. 506

Morrisdale Coal Co. v. *Penna. R. R.*, 230 U. S. 304

Kansas City So. Ry. v. *Albers Commission Co.*, 223 U. S. 573

B. & O. R. R. v. *U. S. ex rel Pitcairn Coal Co.*, 215 U. S. 481

Tex. & Pac. Ry. v. *American Tie & Timber Co.*, 234 U. S. 138

Loomis v. *Lehigh Valley R. R.*, 240 U. S. 43

Great Northern Ry. v. *Merchants Elevator Co.*, 259 U. S. 285

Chicago, B. & Q. R. Co. v. *Merriam & Millard*, 297 Fed. 1

In the case of *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, at page 291, this court said:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission."

In the case of *Texas & Pacific Ry.* v. *I. C. C.*, 162 U. S. 197, 219, this court, in discussing Sections 2 and 3 of the Interstate Commerce Act, said:

> "Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the Commission.
>
> The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact. The mere circumstance that there is in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act."

It necessarily follows that if the tariff charge here in question unduly discriminates against plaintiff in error, or gives any undue or unreasonable preference or advantage to others, or works any undue or unreasonable prejudice or disadvantage to plaintiff in error, its remedy is before the Interstate Commerce Commission where it can have the questions of fact that are thus brought into issue determined.

On page 3 of plaintiff in error's brief it is stated:

> "The issue presented is not the reasonableness or unreasonableness of the penalty, the wisdom of it or the lack of wisdom, but the authority of the carrier or the Commission to inflict the penalty in any event."

Yet, plaintiff in error contends that the tariff rule or provision subjects its traffic to undue and unreasonable prejudice and disadvantage in violation of the Interstate Commerce Act, and apparently relies upon Section 3 of the Interstate Commerce Act.

In *Great Northern Ry. et al,* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, after stating that "Whenever a

rule or practice is attacked as unreasonable or unjustly discriminatory there must be preliminary resort to the Commission", this court said:

> "Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission."

Whether such regulation was reasonable or unreasonable, just or unjust, is a question of fact for the Interstate Commerce Commission to determine. Plaintiff in error cannot, without having such questions determined by the Interstate Commerce Commission, maintain an action for a refund of the tariff charge in a court. From the essential facts, plaintiff in error's action is one for reparation which it desires to secure without going to the Interstate Commerce Commission. One of the authorities relied on by plaintiff in error is the case of *Boston & Maine Ry.* v. *Piper*, 246 U. S. 439, in which case this court held that a stipulation in the Uniform Live Stock Contract filed with the Interstate Commerce Commission, limiting the carrier's liability for unusual delay and detention caused by the carrier's own negligence, to the amount actually expended by the shipper in the purchase of food and water for the stock while so detained was illegal and not binding on the shipper.

The underlying principle of law involved in the Piper case is not the same as the underlying principle involved in the instant case. In the Piper case, the carrier attempted to limit its liability for negligence; no such principle is involved in the instant case. A transportation charge was not involved in the Piper case, nor was the transportation charge exacted for the transportation of the shipment of live stock brought into issue. In the instant case, the charge is a transportation charge within the meaning of the Interstate Commerce Act and is required by the act to be filed as a tariff. A dissimilarity of the two cases and the difference in the principles involved are so apparent that further comment is considered unnecessary.

V.

"TRANSPORTATION" INCLUDES STORAGE, DEMURRAGE AND TERMINAL CHARGES AND THE LAW REQUIRES THAT TARIFFS CONTAINING SUCH CHARGES BE FILED WITH THE INTERSTATE COMMERCE COMMISSION.

In the exercise of its exclusive power to regulate interstate and foreign commerce, Congress has enacted several statutes which not only restrain the states but act directly on individuals and corporations engaged in such commerce, and impose restrictions or create affirmative duties. Among some of the most important of these is the Interstate Commerce Act, enacted in 1887, and many times amended. It has been repeatedly held by this court that Congress has authority, under its sovereign and exclusive power to regulate commerce, to create a commission for purpose of supervising, investigating and reporting upon matters or complaints connected with or growing out of interstate and foreign commerce. By Section 1 of the Interstate Commerce Act,

"transportation" is defined as including "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported." It is made the duty of the carrier "to provide * * * such transportation upon reasonable request therefor."

Section 6 of the Interstate Commerce Act requires that the schedules "shall contain the classification of freight in force and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee."

In the case of *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, at page 638 this court said:

> "The court deemed it to be evident 'that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term "transportation" and subjected to the provisions of the Act respecting reasonable rates and the like.' It is also clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations."

In the case of *Lehigh Valley R. Co.* v. *United States* 188 Fed. 879, the Circuit Court of Appeals, Third Circuit, held that the Interstate Commerce Act required

rules, tariffs, and schedules, relating to demurrage charges to be filed with the Interstate Commerce Commission. The court said, at page 885:

> "It has been uniformly held by the Interstate Commerce Commission that demurrage charges are part of transportation, and are required to be filed with the Commission. 'Beyond all possibility of doubt, therefore, the duty of regulating terminal charges when related to interstate transportation has been lodged with the Interstate Commerce Commission, and federal courts have so held."

It has been held by this court that storage charges, demurrage charges, and terminal charges, are within the purview of Section 6 of the Interstate Commerce Act.

Berwind-White Coal Mining Co. v. *Chicago & Erie R. R.*, 235 U. S. 371

Swift & Co. v. *Hocking Valley Ry. Co.*, 243 U. S. 281

Penn. R. R. Co. v. *Kittanning Iron & Steel Mfg. Co.*, 253 U. S. 319

The uniform demurrage code published in tariff form has been considered by this court and the foundation upon which the code was built was recited by this court in the case of *Swift & Co.* v. *Hocking Valley Co.*, 243 U. S. 281, 283, 284. This court considered the demurrage rules and charges in the case of *Pennsylvania R. R.* v. *Kittanning Iron & Steel Mfg. Co.*, 253 U. S. 319. At page 323 the court said:

> "The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars."

VI.

THE TRANSPORTATION ACT 1920 INTRODUCED INTO FEDERAL LEGISLATION A NEW RAILROAD POLICY, WHICH POLICY WAS TO INSURE ADEQUATE TRANSPORTATION SERVICE.

To insure adequate transportation service is the underlying principle of the Transportation Act 1920. Before its passage the effort of Congress had been directed mainly to the prevention of abuses; particularly those arising from excessive or discriminatory rates.

Akron, C. & Y. R. R. Co. v. *U. S.* 261 U. S. 184, 189

Wisconsin R. R. Comm. v. *C. B. & Q. R. R.*, 257 U. S. 563, 585

In the case of *Dayton-Goose Creek Ry. Co.* v. *United States, et al*, 263, U. S. 456, this court considered the purpose and scope of the Transportation Act 1920, and, after pointing out what this court held in *Wisconsin Railroad Commission* v. *C. B. & Q. R. R.*, 257 U. S. 563, and *New England Division case*, 261 U. S. 184, said, page 478:

> "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their

issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

Under paragraph 15 of Section 1 of the Interstate Commerce Act (41 Stat. L., 476) the duty is imposed upon the Interstate Commerce Commission in time of emergency, to make such just and reasonable directions with respect to car service during such emergency as will, in its opinion, best promote the service in the interest of the public and the commerce of the people. In other words, it is the duty imposed upon the Commission to see that the avenues of interstate and foreign commerce are not blocked. This is the duty of the carriers by rail as well, and even if there were no rules or regulations requiring that the avenues through which interstate and foreign commerce move be kept open and free, it would be to the interest of the railroads to see that such avenues were kept open and free, and they would have the right to establish any regulation within reason to prevent such avenues being closed. This duty they owe not only to themselves, but to the shipping public.

VII.

THE TRANSPORTATION ACT 1920 AMENDED SECTION 1 OF THE INTERSTATE COMMERCE ACT, DEFINED "CAR SERVICE," AND MADE IT THE DUTY OF THE INTERSTATE COMMERCE COMMISSION TO DETERMINE WHETHER OR NOT THERE EXISTS A CAR SHORTAGE, OR OTHER EMERGENCY, AND AUTHORIZED THE COMMISSION TO ESTABLISH RULES THAT WILL BEST PROMOTE THE SERVICE IN THE INTEREST OF THE PUBLIC AND THE COMMERCE OF THE PEOPLE.

At the time the car in question moved, and prior thereto, there was a car shortage in this country. When this car shortage first became serious and threatening, the Director General was in charge of the operation of the railroads of this country and in order to keep the avenues of commerce open, the additional storage charge or so-called penalty charge in the uniform demurrage rules was established. After federal control ceased, the railroads continued the charge in question. The shippers attempted to have the tariff filed by the railroads suspended, but the Interstate Commerce Commission refused to suspend it. A complaint was filed challenging the right of the carriers under the Interstate Commerce Act, and under the law, to maintain such a provision, but the Interstate Commerce Commission found that conditions existing at the time the tariff was in effect had warranted the establishment of a penalty charge and that said charge was not unreasonable or otherwise unlawful.

In the case of *Edward Hines, etc. Trustees*, v. *United States, et al*, 263 U. S. 143, this court said, at pages 145, 146:

> "The essential facts are these: On October 20, 1919, the Director General of Railroads established a so-called penalty charge of $10 per car per day

on lumber held at reconsignment points. The declared purpose of the charge was 'to prevent undue detention of equipment under the present emergency.' The charge (in modified form) remained in force throughout the period of federal control; and thereafter it was continued by the carriers. In September, 1920, the American Wholesale Lumber Association instituted proceedings before the Commission to secure cancellation of this charge as being unreasonable, unjustly discriminatory, unduly prejudicial and without warrant in law. * * * After extensive hearings the Commission held that it was within the power of the Director General, and of carriers, to establish penalty charges in order to prevent undue detention of equipment by shippers; that conditions existing at the time had warranted the establishment of a penalty charge; and that the charge then imposed had not been shown to be unreasonable."

The Transportation Act 1920 (Section 402, Para., 15) authorizes the Interstate Commerce Commission, whenever it is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, to suspend its rules as to car service and make such emergency rules as in the Commission's opinion will best promote service in the interest of the public and the commerce of the people. The Commission has found that the conditions existing at the time the car in question moved justified the charge, and that finding of the Commission cannot be challenged in this proceeding. *Lambert Run Coal Co.* v. *B. & O. R. R.*, 258 U. S. 377, 381.

The principle involved in the instant case is similar to the principle involved in the case of *Avent* v. *United States*, 266 U. S. 127. In that case the plaintiff in error contended that certain rules and regulations established by the Interstate Commerce Commission in time of emergency deprived him of his constitutional rights by

denying him the due process of law, and also contended that the Commission's order was unconstitutional. The court said on page 130:

> "The right to come here depends upon the presence of some substantial constitutional question. But so far as such questions are raised we are of opinion that they are not substantial in view of previous decisions. We must take it that an emergency contemplated by the statute existed, as found by the Commission and alleged in the indictment. That in such circumstances Congress could require a preference in the order of purposes for which coal should be carried, consistently with the Fifth Amendment, is clear and is assumed in *Peoria & Pekin Union Ry. Co.* v. *United States*, 263 U. S. 528, 532. See also *Wilson* v. *New*, 243 U. S. 332. *Fort Smith & Western R. R. Co.* v. *Mills*, 253 U. S. 206, 207. *Pennsylvania R. R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 133. That it can do so without trenching upon the powers reserved to the States seems to us not to need argument. That it can give the powers here given to the Commission, if that question is open here, no longer admits of dispute. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452. *United States* v. *Grimaud*, 220 U. S. 506. *Pennsylvania R. R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 133. The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed. *Union Bridge Co.* v. *United States*, 204 U. S. 364. *Nash* v. *United States*, 229 U. S. 373, 376, 377. *Intermountain Rate Cases*, 234 U. S. 476, 486. *Mutual Film Co.* v. *Industrial Commission of Ohio*, 236 U. S. 230, 246."

As heretofore pointed out, when a tariff rule, regulation or charge, is filed with the Interstate Commerce Commission pursuant to law, the reasonableness or unreasonableness, the justness or unjustness, of it presents a question for determination by the Interstate

Commerce Commission, and a court cannot take jurisdiction of the question until the Interstate Commerce Commission has passed on it. It is the position of defendant in error that under the law as it exists to-day, and as it existed at the time the shipment in question moved, the carrier's duty, as well as the duty of the Interstate Commerce Commission, is to see that the avenues of commerce are kept open for the free and unobstructed movement of interstate and foreign commerce. One class of shippers should not be permitted to dam the channels of interstate commerce by the method or manner of transacting their business, and at the same time avoid charges, rules and regulations established by the carriers and approved by the Interstate Commerce Commission, intended to prevent abuse. The frivolous contention that such regulation transcends constitutional rights, because such regulation does not apply to others whose conduct of business does not thwart the purpose and intent aimed at by the charge, rule and regulation here brought into issue must fail if the benefits of the statute are to be realized.

In the light of the foregoing, we submit that the writ of error presents no substantial question arising under the Constitution of the United States, and that it should be dismissed.

Respectfully submitted,

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